Supreme Court, U.S.
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No. 91-1694

In The

Supreme Court of the United States

October Term, 1991

LATIAN, INC. and AMANOLLAH SARBAZ,

Petitioners,

v.

BANCO DO BRASIL, S.A. and JOAO STEFANON,

Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeal Of The State of California
Second Appellate District
Division Three

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS S.L. WANG, ESQ.
Counsel of Record
MICHAEL T. WELCH, ESQ.
MARIA B. SHUMAN, ESQ.
WANG & WANG
Three Embarcadero Center
Sixteenth Floor
San Francisco, California 94111
(415) 788-8008

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDINGS BELOW AND LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES.

The parties to the proceedings below were as follows: Banco do Brasil, S.A., Los Angeles Agency, an agency organized and existing under the laws of the State of California of a banking organization organized and existing under the laws of the Federation Republic of Brazil, was plaintiff and cross-defendant in the trial court. Joao Stefanon, an individual, was also a cross-defendant.

Latian, Inc., a California corporation, and Amanollah Sarbaz, an individual, were defendants and cross-complainants.

In the Court of Appeal for the State of California, Banco do Brasil and Joao Stefanon were appellants; Latian, Inc. and Amanollah Sarbaz were respondents and cross-appellants.

Pursuant to Rule 29.1, petitioner Latian, Inc. represented in its Petition that it has no parent companies, subsidiaries, or affiliates.

Pursuant to Rule 29.1, respondent Banco do Brasil lists the following partially owned subsidiaries:

(i) Companhia Acos Especiais Itabira (ACESITA)

(ii) Acesita Energetica S.A.

(iii) Forjas Acesita S.A.

(iv) Computadores e Sistemas Brasileiros S.A. (COBRA)

(v) Eurobaz Limited

(vi) Banco Brasileiro Iraquiano S.A.

Respondent Banco do Brasil has no parent companies or other affiliates.

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JURISDICTION

Petitioners Latian and Sarbaz claim that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257. As is more fully set out below, in the Summary of Argument, a substantial federal question does not exist in this case as to invoke this Court's jurisdiction. Furthermore, the final judgment on this matter was based on adequate state grounds.

STATEMENT OF THE CASE

Procedural History

Respondent Banco do Brasil ("Banco") commenced this action in California state court against petitioners Latian, Inc. ("Latian") and Amanollah Sarbaz ("Sarbaz") on January 28, 1985 seeking to recover sums due and unpaid under a January 1983 Guaranty Payment Agreement and three promissory notes dated June 28, 1983, December 6, 1983 and December 31, 1983. Petitioners Latian and Sarbaz, filed a cross-complaint against Banco and respondent Joao Stefanon ("Stefanon") claiming fraud and breach of contract based on the alleged failure of Banco to honor an oral commitment to provide them with an additional $2 million line of credit.

Trial commenced on June 12, 1989 before a jury in California Superior Court, County of Los Angeles. On July 12, 1989, the jury, in a ten-two split of opinion, returned a verdict against Banco on two of Latian's counter-claims. The jury awarded Latian and Sarbaz $1.9 million in damages for fraud against Banco and Stefanon,

$3.6 million for breach of contract against Banco, and $22 million in punitive damages against Banco. There was also an award against Stefanon for $2.4 million in punitive damages, later reduced to $500,000. Judgment was entered July 12, 1989.

Shortly after the verdict, the Trial Judge, Judge Billy Mills, suffered a disabling stroke. The case was turned over to the presiding judge, who subsequently referred it to the Honorable Richard Lavine, to hear all post-trial motions. Because complete transcripts of the trial were not available and Judge Lavine was not present at the trial, his rulings were necessarily made without the benefit of a review of the evidence. On post trial motions, Judge Lavine remitted the punitive damages against Banco to $5 million and against Stefanon to $5.

Banco and Stefanon timely filed their Notice of Appeal to the Court of Appeal, State of California, Second Appellate District, Division Three. On appeal, the state appellate court reversed the judgment in its entirety and remanded with instructions to enter judgment in favor of Banco, based upon the appellate court's finding that (a) the petitioners' entire case rested upon their claims that there was an extrinsic oral agreement for the Bank to give them a $2 million line of credit and that such claims were barred by the parol evidence rule as a matter of law, and (b) the record showed that petitioners failed to present "substantial evidence" to support their claims that the Bank made and breached an oral agreement to give petitioners a $2 million line of credit. The Order of the Court of Appeal was issued on September 27, 1991.

Thereafter, petitioners Latian and Sarbaz sought rehearing before the California Court of Appeal and were

denied by Order issued October 25, 1991. They also sought review in the Supreme Court of California even though no grounds for review existed according to Rule 29 of the California Rules of Court.

Accordingly, the California Supreme Court denied review *en banc*, without opinion by Order issued January 23, 1992.

Factual Background[1]

Respondents incorporate by reference herein the complete section entitled "Factual Background" from the Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, entered September 27, 1991 and reported as *Banco do Brasil v. Latian, Inc.*, 234 Cal. App.3d 973, 285 Cal. Rptr. 870 (1991). A copy of that Opinion is attached as Appendix A to petitioners' Petition for Writ of Certiorari at pages A-1 to A-53.

Basis of Federal Question

Petitioners claim at page 2 of their petition that the federal question in this case arose when the California Court of Appeal issued its Order reversing the lower court's judgment. In particular, petitioners claim that the federal question arose from the following statement in the Opinion issued by the Court of Appeal at p. A-49:

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[1] A respondent may incorporate by reference the statement of the facts in the opinion below. Stern & Gressman, *Supreme Court Practice*, 6 ed., section 6.37, p. 390.

> This court, in viewing the whole record through the prism of a search for evidence which is "reasonable in nature" must look at the transaction as a whole. Does the self-serving claim of the respondents make any sense? Would a bank which has so meticulously documented every aspect of a transaction commit itself orally and so casually to such an important obligation? We think not. **Banks simply do not do business that way.** Not only is the evidence offered by the respondents insubstantial and unreasonable, it defies belief. It is not solid, credible or reasonable and cannot support the conclusion that Stefanon ever made a commitment to, or that Banco ever intended to promise, a "$2 million line of credit" to Latian. (Emphasis added to sentence taken out of context by petitioners as the entire basis of their claim that a federal question arose.)

SUMMARY OF ARGUMENT OPPOSING CERTIORARI

1. Petitioners have no standing to seek review by this Court or to invoke the jurisdiction of this Court because the Seventh Amendment does not apply to state civil trials, as in the contract action below;

2. Petitioners' purported "federal question" argument based on the Seventh and Fourteenth Amendments was not properly raised or decided at the state court level. Therefore, petitioners have no basis to invoke the jurisdiction of this Court;

3. Petitioners' purported "federal question" argument should not be reviewed because the state Court of

Appeal decided this case based on two alternative adequate state grounds. The primary basis for its decision was a legal determination that petitioners' only evidence supporting their verdict should have been excluded under California contract law which prohibits the use of parol evidence to contradict a written instrument. The second basis for its decision was that the record showed that petitioners failed to present "substantial evidence" to support their claims that the Bank made and breached an oral agreement to give petitioners a $2 million line of credit.

4. Petitioners failed to present any "special and important reasons" for this Court to grant review. Specifically, petitioners have failed to argue that either of the procedures actually used by the state appellate court to reverse the trial verdict in any way violated their "due process" rights or threatened the rights of any other litigants; or that said procedures conflicted with any applicable Supreme Court decision.

REASONS FOR DENYING THE WRIT

I. LATIAN'S PETITION SHOWS ABSOLUTELY NO BASIS FOR INVOKING THE JURISDICTION OF THIS COURT.

Petitioners assert that this Court has jurisdiction over this matter pursuant to 28 USC Sec. 1257(3). Because the underlying case plainly involved neither the validity of a United States statute or treaty, nor a state statute, petitioners argue that this Court should review their writ of certiorari based solely on the last jurisdictional ground

stated under Sec. 1257(3), i.e., that this writ presents a "right, privilege or immunity . . . specially set up or claimed under the Constitution" of the United States. In sum, petitioners contend (1) that the California Court of Appeal reversed a jury verdict "based entirely on its disagreement with the factual findings of the jury and the trial court" and (2) that this reversal therefore violated petitioners' right to a jury trial under the Seventh Amendment to the U.S. Constitution.

Petitioners' first assertion is a flagrant distortion of the appellate decision, which was plainly based on two separate and well-supported state grounds. However, this Court need not even look to the underlying decision to deny this writ. As shown below, the purported "federal question" now raised by petitioners exposes their complete lack of standing or any basis to invoke the jurisdiction of this Court. Indeed, the only question for this Court to consider now is whether to sanction petitioners for submitting a frivolous petition and deliberately misleading this Court to try to obtain review.

A. Because The Seventh Amendment Clearly Does Not Apply To State Civil Trials, Petitioners Have No Standing To Request Review By This Court.

The same argument petitioners offer to try to obtain this Court's review shows that they are not entitled to it, and ends this issue where it begins. Simply put, the California Court of Appeal could not have denied petitioners their "constitutional rights" under the Seventh Amendment because petitioners plainly had no such

rights. The obvious reason is that the Seventh Amendment *does not apply to state civil jury trials.* Therefore, petitioners have absolutely no standing to seek review by this Court, and their petition must be denied.

The Seventh Amendment guarantee of a jury trial in civil cases was not an element of due process applicable to state courts through the Fourteenth Amendment. *O'Connor v. State of Nevada,* D.C. Nev. 1981, 507 F.Supp. 546, 548, affirmed 686 F.2d 749, certiorari denied 459 U.S. 1071. Consequently, a litigant in a state court civil action has no constitutional right to trial by jury under the Seventh Amendment or under the due process clause of the Fourteenth Amendment. *Iacaponi v. New Amsterdam Cas. Co.,* D.D. Pa. 1966, 258 F.Supp. 880, 884, affirmed 379 F.2d 311, cert. denied 88 S.Ct. 802. See also, e.g., *Sealey By and Through Sealey v. Hicks,* Or. 1990, 309 Or. 387, cert. denied, 111 S.Ct. 65 (The Seventh Amendment right to jury trial does not apply to the states).

Thus, contrary to petitioners' unfounded statement on page 7 of their petition, this Court has *never* enforced the second clause of the Seventh Amendment in any *state civil* action, and has uniformly rejected any petition for certiorari arising from the alleged denial of jury trials in state civil actions.[2] Similarly, the appellate decision below, even if it bore the slightest resemblance to the

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[2] Respondents note that petitioners' sole cited "authority", a section of a Wisconsin Law Review article, discusses only *federal cases,* for the very reason that they are the only ones subject to the Seventh Amendment. (Indeed, the title of this article is "Appellate Review of *Federal* Civil Jury Verdicts").

"straw man" version concocted by petitioners, could not "erode the constitutional guarantees enjoyed by the American people" (Petition, p. 6) because no such guarantee has ever been offered in state civil trials. Moreover, were this Court concerned over the alleged runaway "practice of appellate judges imposing their views as a substitute for the evidence" (Petition, p. 8), it obviously should select for review a case in which the Seventh Amendment applies, i.e., a federal or state criminal case.[3]

Finally, this Court should note that petitioners have never attempted to argue that the above law is incorrect, or that the Seventh Amendment *should* be incorporated by the Fourteenth Amendment and applied to state civil actions. Rather, they have simply assumed, quite incorrectly, that the Seventh Amendment does govern such actions, and argued only that they were denied their Seventh Amendment "rights". Because such rights plainly never existed, this petition should be rejected out of hand. Accordingly, this Court need read no further.

B. Because Petitioners Failed To Raise A Substantial Federal Question In The State Court Proceedings, This Court Has No Jurisdiction To Review This Matter.

Petitioners have newly crafted their purported constitutional arguments for the first time in the instant

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[3] Petitioners' cited law journal shows that the Court has been presented with numerous opportunities to review federal cases that are both subject to the Seventh Amendment and arguably infringe upon it, and that the Court has consistently denied review of these otherwise "eligible" cases.

petition, only after the California Supreme Court rejected their arguments below solely on state law. Therefore, this Court has no jurisdiction to consider them now.

It is essential to the jurisdiction of the Supreme Court under Sec. 1257 that a substantial federal question has been properly raised in the state court proceedings. Stern & Gressman, *Supreme Court Practice*, 6th Ed., section 3.25, p. 208. Litigants who seek to bring cases to the United States Supreme Court from state courts must present federal issues first in the state court systems, not only as a matter of comity, but in order to afford parties the opportunity to develop the record necessary for adjudicating the issue and to permit the state courts to exercise their authority to construe state statutes so as to avoid or obviate federal constitutional challenges. *Webb v. Webb*, 451 U.S. 493 (1981). This also permits the state court to identify independent and adequate state grounds that would moot the federal issue. *Id.*

It is well established that the Supreme Court is vested with no jurisdiction unless a federal question was raised *and* decided in the state court below. *Crowell v. Randell*, 35 U.S. 368 (1836); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). As Justice Harlan stated in a dissent, "The rule that in cases coming from state courts this court may review only those issues which were presented to the state court is not discretionary but jurisdictional", *Amalgamated Food Employees Union v. Logan Valley Placer*, 391 U.S. 308, 334 (1963). Moreover, a federal question must be properly framed, raised, presented and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962).

It is clear that in the instant matter neither the Court of Appeal nor the California Supreme Court ever entertained or decided the Seventh Amendment issue petitioners are now raising, primarily because petitioners never properly raised this issue before any state court at any level. Although petitioners claim they first argued this issue in their petition for rehearing before the Court of Appeal, the record completely rebuts this assertion. A copy of this petition for rehearing is attached hereto to the Appendix ("App.") as A-1 to A-35 to this Opposition. It shows that petitioners argued five distinct grounds for reconsideration by the Court of Appeal (See, e.g., Table of Contents at App. A-2). Not one of these arguments was based on, involved or even mentioned the Seventh Amendment or Fourteenth Amendment. Indeed, the only reference to the Seventh Amendment (which petitioners quote in their instant Petition, p. 2) appears solely in the Conclusion to that petition for rehearing (App. A-34), not as a properly framed argument, but merely as part of a spiteful and rambling "parting shot", chastising the Court of Appeal for its decision reversing the verdict.

More important is the fact that petitioners did not properly raise this constitutional issue in their subsequent petition to the California Supreme Court, the "highest state court". A copy of the petition to the California Supreme Court is attached hereto to the Appendix ("App.") as B-1 to B-28. For a "federal question" to be properly subject to review by the U.S. Supreme Court, it must first have been pursued in the state court in the manner and with the degree of specificity required by the state rules of practice. See *Beck v. Washington, supra.*

Failure of a party to follow the appellate channels and procedures required by the state will be deemed a waiver of the federal issue and there will be no basis for the assertion of the Supreme Court's jurisdiction. *Herndon v. Georgia,* 295 U.S. 441, 443 (1935). See also *Beck v. Washington, supra,* at 553 (A litigant waived the federal issue by failing to list it among the "assignment of errors" in its brief to the state supreme court, or to argue the point in that brief, but instead merely mentioned it in one sentence of its brief).

In the instant case, California Rule of Court 28(e)(2) expressly required petitioners to state, at the "beginning of the body of the petition", *all issues presented for review* by the California Supreme Court. Petitioners listed only four specific issues, none of which cited or referred to the Seventh Amendment or any other federal issue. (See, e.g. Table of Contents at App. B-2) Because petitioners undeniably failed to raise the instant "federal question" in their petition before the highest state court in accordance with its own rules, they cannot raise it now before this Court.

Petitioners try to dodge this fatal bullet by pointing to a generic passing reference to "denial" of its "rights to due process" bandied about in their *Reply* to Banco's brief opposing their petition to the California Supreme Court. (App. C-7) This is grasping at short straws. A copy of the *Reply* in support of the petition to the California Supreme Court is attached hereto to the Appendix ("App.") as C-1 to C-14. First, even the most generous interpretation of this vague, random and general language leaves it well short of a properly framed federal question. Second, even a properly framed federal question cannot be raised in a

"reply brief" as a matter of California law. Under California Rules of Court, Rule 28(e)(2), it *must* be raised in the *petition* in the manner stated above. Finally, the California Rules of Court do not even allow "reply briefs" to be filed by petitioners, *unless* the respondents expressly raised additional specified "counter issues" in its brief. California Rules of Court, Rule 28(d). Respondents unquestionably did not. Therefore, this sole purported basis of "federal question" jurisdiction is not only plainly inadequate, it was a complete violation of the state rules in every respect.

II. THE STATE APPELLATE COURT DID NOT REVERSE THE JURY VERDICT BASED ON ITS COLLECTIVE "VIEW OF THE WORLD", BUT ON TWO INDEPENDENT AND WELL-SUPPORTED STATE GROUNDS.

A. Petitioners Have Completely Distorted The Basis Of The Appellate Court's Decision In An Ill-Considered Effort To Obtain Review.

Petitioners have resorted to a transparent distortion of the appellate decision to try to extract a constitutional issue from it. Petitioners' repeated contention that the appellate court based its decision solely on its "views" about "how Banks do business" is not only false, it is a contemptible effort to deceive this Court and should subject petitioners to appropriate sanctions. Moreover, it fails to obscure the undeniable fact that the appellate court fully decided this matter on adequate state grounds, thereby barring review.

The Supreme Court has consistently adhered to the principle that it will not review a state court judgment

based upon an adequate and independent nonfederal or state ground, even though a federal question be involved and perhaps wrongly decided. *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908). Here, the Court of Appeal expressly based its decision on *two* alternative state grounds, each of which was independently sufficient to support the reversal, and neither of which relied on the appellate court's subjective "views of the world". Supported by a uniquely thorough 70 page opinion, the appellate court based its reversal first and foremost on the well-established California rule excluding use of parol evidence to contradict an express written agreement. (See Appendix to Petition, hereinafter "Pet.App.", Pet.App. A-1 to A-53.) The appellate court then reinforced this decision by also finding that petitioners failed to present "substantial evidence", in accordance with California's applicable legal standard, to support their claims of an oral side agreement for a $2 million loan. (See Pet.App. A-43 to A-52.) Should this Court wish further elucidation of these two findings, respondents discuss each of them more thoroughly below.

Reason One – Petitioners' Oral Testimony Was Barred By California's Parol Evidence Rule

In sum, petitioners' sole evidence supporting their verdict was their own oral testimony that the Bank had made and breached an oral "side agreement" to lend them $2 million, even though this was never mentioned in the loan and guaranty agreements signed by petitioners and which expressly superseded any oral agreements. After meticulously analyzing petitioners' contention against all of the established state legal tests

and criteria, as well as the important state policy considerations intended to prevent fraud and support the sanctity and certainty of contracts, the California Court of Appeal easily concluded that the written loan agreements were "integrated" and that petitioners' parol evidence should not have been admitted by the trial court. (Pet.App. A-42.)

Even though the Court of Appeal devoted 22 pages of its opinion to the parol evidence issue and explicitly reversed the verdict on this legal determination alone, before even addressing the "sufficiency of evidence" (see Pet.App. A-26 to A-43), petitioners chose to bury this dispositive fact in a footnote to their petition. (Petition, footnote 4, at pps. 4-5.) They reluctantly admit, as an aside in footnote 4 of their Petition that "the Court of Appeal also made an alternative ruling based on the parol evidence rule." (Petition, footnote 4, at pps. 4-5.) However, they neglected to state that this "alternative ruling" was independently dispositive of the case. (See Pet.App. A-26 to A-43.) Moreover, their misdirected effort to dismiss this exhaustively supported ruling as being "infected" with the Court's "own opinion" is breathtaking in its audacity. Petitioners fail to cite even one word from the appellate decision to support this charge. Conversely, the Opinion shows that this ruling was based solely on incontestible law and undisputed facts, most of which were derived from *petitioners'* own testimony and arguments on appeal.

For example, the Court found that petitioners' own testimony improperly contradicted the written loan Guaranty Agreement, because petitioners testified that their

obligation to repay their loans as required by this agreement was subject to an oral *condition;* i.e. receiving a $2 million line of credit from the Bank. However, the Guaranty Agreement expressly stated that their duty to repay these loans was "*absolute* and *unconditional*". (Pet.App. A-32 to A-34.) Similarly, the appellate court determined that the Guaranty Agreement was "integrated", i.e. intended to be the complete and final expression of the parties' agreement, primarily because the Agreement contained an "integration" clause that "[petitioners] concede[d] they read, understood and discussed with their attorneys". (Pet.App. A-32.) This clause specifically provided that the Guaranty Agreement "embodies the *entire agreement* and understanding among the parties hereto and *supersedes all prior agreements and understandings* relating to the subject matter hereof." (Emphasis by appellate court). (Pet.App. A-23.) As the appellate court stated:

> "It is difficult to imagine how the parties could have more clearly expressed their intent to make the written instrument a full and complete expression of their agreement." (Pet.App. A-32.)

These direct citations conclusively show that petitioners' statements in their footnote 4 (i.e., "the appellate court's holding with respect to the integration issue was premised on its *inserted* finding . . . that banks don't make oral promises for a line of credit") were blatant falsehoods intended to mischaracterize the appellate decision and mislead this Court. The appellate court's *legal* determination was plainly premised solely on that court's eminently logical analysis of undisputed facts and the plain language of the agreements which petitioners admittedly negotiated and signed.

Reason Two – Petitioners' Oral Testimony Was Also Insufficient To Support The Verdict

As shown above, the appellate court's decision involved no federal question and was based on an adequate state legal ground completely separate from any subjective factual determination as alleged by petitioners. Nonetheless, it would be a disservice to this Court and the appellate court below if respondents stopped there and did not further expose the degree of petitioners' distortions of the Opinion below.

Even though the appellate court disposed of the entire case on parol evidence grounds, petitioners' oral testimony upon which the verdict was based was so insubstantial that the court felt compelled to add this as a second, equally sufficient basis for reversal. (Pet.App. A-43 to A-52.) In determining whether petitioners' testimony of an oral promise of a $2 million line of credit was "reasonable in nature, credible and of solid value" (the proper standard of review in California; see Pet.App. A-43), the appellate court did not rely on its "view of the world", but on *undisputed facts* taken from the entire record. Again, chief among these facts were the statements and conduct of petitioners themselves and their agents, which invariably contradicted their claims and showed them to be inherently unreasonable and incredible.[4]

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[4] The following facts are but a few examples:

1. Petitioners admitted that they were told that extension of a $2 million line of credit was

(Continued on following page)

Petitioners improperly omit any mention of these dispositive facts cited by the appellate court and mislead

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(Continued from previous page)

conditioned on approval by the Bank's head office, and that such approval was not granted; (Pet.App. A-9 to A-10, fn. 12; Pet.App. A-21 to A-22.)

2. Petitioners (who were complete strangers to the Bank) admitted that they were required to submit written financial statements to support their oral request for a line of credit, and that they failed to do so. (Pet.App. A-13, fn. 15; A-19.) They also admitted that the oral information they gave the Bank regarding this financial condition was materially *false*, and that they overstated their capitalization by almost *eight times* its real value; (Pet.App. A-20, fn. 28; A-48.)

3. Petitioners testified that getting a line of credit from the Bank was the most important reason they entered into the agreements to acquire the Kudsy auto parts company and assume its loans due to the Bank. (Pet.App. A-32; A-33 to A-34, fn. 44; A-47.) Yet, despite this claimed urgency, and despite the fact that they were represented by lawyers throughout the whole transaction, they never once even mentioned a line of credit in any of the *five* written contract offers they submitted to Kudsy, in any of their contemporaneous correspondence to the Bank, or in the integrated Guaranty Agreement, which expressly precluded any oral or prior agreement; (Pet.App. A-35; A-47.)

4. Petitioners' own lawyers, who were responsible for drafting these agreements, testified unequivocally that if there had been such an agreement for a $2 million line of credit, it surely would have been set forth in writing (Pet.App. A-11, fn. 12.); the trial

(Continued on following page)

this Court by stating that the appellate court relied solely on its own views of banking practices as the basis for its conclusion that petitioners' testimony was not "substantial evidence". Because the case below was plainly and properly decided on two independent state grounds, it is not subject to review by this Court.

III. PETITIONERS HAVE FAILED TO SHOW ANY "SPECIAL AND IMPORTANT REASONS" FOR THIS COURT TO GRANT REVIEW.

In addition to the multitude of fatal defects in petitioners' brief shown above, petitioners also have failed to establish any "special and important reasons" that their writ should be granted. Rule 10 of the Supreme Court states, in pertinent part:

> A petition for writ of certiorari will be granted only when there are special and important reasons therefor, (such as):

(Continued from previous page)

judge agreed: "And I have a very – I just have a very difficult time understanding, with the advice of counsel, if something was that important they would not have it included in the contract." (Pet.App. A-36, fn. 45.)

5. Petitioners' testimony failed to show any basic essential terms of the alleged oral loan agreements, such as rates of interest, repayment terms and schedules, and security, necessary to form a valid and enforceable loan agreement. (Pet.App. A-49, fn. 55.)

> (b) when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) when a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

It is, of course, abundantly clear that the California Supreme Court was never presented with and never decided any question of federal law in this case. (See App. B-1 to B-28.) Even disregarding this legal pre-requisite, petitioners' purported federal questions plainly fail to qualify for review.

Because the Seventh Amendment has no bearing on this case, petitioners are left with their claim that reversal of the verdict by the Court of Appeal violated their right to "due process". Although attractively packaged, this argument is ultimately just another empty box. First, it is predicated solely on petitioners' totally discredited claim that the court relied only on its "views", rather than the law and evidence as the Opinion below demonstrates. (Petition, p. 11) Second, unlike the *Haslip* case cited by petitioners, petitioners fail to identify any actual "procedure" that occurred in this case that allegedly threatens due process as to them or to other litigants. The appellate court did not vacate the instant punitive damages award because it disagreed with the procedure by which they were determined. Rather, the damages all fell because the

appellate court reversed the verdict pursuant to its finding that it violated the parol evidence rule, *a rule of contract law.* Petitioners do not argue that the California parol evidence rule violates their right to due process, nor do they argue that it conflicts with similar procedures adjudicated in other states.

Similarly, petitioners do not attempt to argue that the "substantial evidence" standard of review employed by California appellate courts violates due process or conflicts with other state standards for reviewing trial court decisions. Because petitioners' "due process" argument addresses only an aberrant "straw man" procedure solely of their own creation, and, nowhere followed by the appellate court below, it presents no conceivable basis for review of this decision.

IV. THIS COURT SHOULD AWARD COSTS AND FEES AGAINST PETITIONERS FOR FILING A CLEARLY FRIVOLOUS PETITION.

Rule 42.2 of the Supreme Court Rules provides for sanctions in the event petitioner submits a frivolous petition for writ of certiorari. It states, in pertinent part:

> Where a petition for a writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or applicant, or against the party's attorney or against both.

Respondents acknowledge that litigants are entitled to raise all *proper* argument that might give them reasonable grounds to seek review in this Court, and that this Court should therefore exercise flexibility and restraint in determining the appropriateness of sanctions. However, precisely because this is the court of last resort for a losing litigant, there is great potential for abuse by litigants and their lawyers driven to misstate facts and law or mischaracterize decisions to try to convince this Court that they have satisfied the stringent threshold requirements for its consideration for review. It follows that counsel appearing before this Court, who are required to be specially admitted on a showing of their good standing, should have a high duty to adequately review the facts and law of the case to ensure that they meet the criteria for consideration by this Court, and most importantly, to present these facts and law candidly and accurately to this Court.

Respondents submit that petitioners have plainly failed on both these counts. First, even the most minimal research would have shown that the Seventh Amendment does not apply to state civil jury trials, and that petitioners therefore have no grounds whatsoever to even request review by this Court. Because this law is so clear, and because petitioners made no effort to challenge this law, their petition is inherently frivolous.

Even more worthy of sanctions are petitioners' repeated and deliberate misstatements and distortions of the Court of Appeal Opinion, as shown above. The unfair effect of this conduct has been to force respondents to devote substantial time and expense to oppose and refute unfounded arguments and assertions that never should

have been filed. This has also imposed an undue burden on this Court, diverting it from consideration of other meritorious petitions. The effect goes deeper, because it forces this Court to be a "policeman", to scrutinize the truth and accuracy of statements in a process that should depend upon self-policing by the counsel permitted access to this Court. This Court should therefore award respondents their fees and costs in having to prepare this response, both to compensate respondents for this unfair and improper imposition, and to discourage these and other litigants from filing frivolous petitions in this Court.

CONCLUSION

For each of the reasons stated above, respondents Banco do Brasil, S.A. and Joao Stefanon respectfully pray that this Court deny the petition for writ of certiorari submitted by petitioners Latian, Inc. and Amanollah Sarbaz.

Respectfully submitted,

FRANCIS S.L. WANG, ESQ.
Counsel of Record
MICHAEL T. WELCH, ESQ.
MARIA B. SHUMAN, ESQ.
WANG & WANG
Three Embarcadero Center
Sixteenth Floor
San Francisco, California 94111
(415) 788-8008

Attorneys for Respondents

Dated: May 22, 1992

APPENDIX

Civil No. B 045477

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BANCO DO BRASIL, S.A., Los Angeles Agency, a Banking association organized and existing under the laws of Brazil,

Plaintiff/Cross-Defendant/Appellant,

JOAO STEFANON, an individual,

Cross-Defendant/Appellant,

LATIAN, INC., a California corporation; AMANOLLAH SARBAZ, an individual; DOES 1-20, inclusive,

Defendant/Cross-Complainants/ Respondents and Cross-Appellants.

Appeal from the Superior Court of Los Angeles County
The Honorable Billy G. Mills, Trial Judge
The Honorable Richard A. Lavine, Post-trial Judge

RESPONDENTS' AND CROSS-APPELLANTS' PETITION FOR REHEARING

GRAY, PLANT, MOOTY, MOOTY & BENNETT, P.A.
DANIEL R. SHULMAN
PENNY M. TIBKE
3400 City Center
33 South Sixth Street
Minneapolis, MN 55402
(612) 343-2800

JOSEPH M. ALIOTO, ESQ.
Forty-third Floor
600 Montgomery Street
San Francisco, CA 94111
(415) 434-8900

Attorneys for Respondents and Cross-Appellants

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Pursuant to California Rule of Court 27, Respondents and Cross-Appellants ("Latian") hereby petition the Court for a rehearing of this matter, which is the subject of the Court's Order filed September 27, 1991 ("Order").

I. INTRODUCTION

> Does the self-serving claim of the Respondents make any sense? Would a bank which has so meticulously documented every aspect of a transaction commit itself orally and so casually to such an important obligation? We think not. Banks simply do not do business that way.

(Order, p. 66.) These comments graphically illustrate the character of this Court's entire 70-page Order. This prejudice – and it must be prejudice or pre-judgment because no evidence in this record supports this statement – taints the entire Order. Had any juror expressed such a predisposition during voir dire, that juror would have been excused for cause. Had any trial judge expressed such a predisposition, that judge would have been justifiably disqualified. Had any expert witness expressed such a view, that expert would have been buried on crossexamination. Given the occurrences over the last five years with the savings and loan scandals and the BCCI fraud, it defies belief that any informed person could still hold such a belief.[1] Moreover, it is a travesty of justice that any

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[1] In rejecting similar assertions made by Banco's counsel during the post-trial hearings, Judge Richard Lavine drew the parties' attention to an article appearing in the Southern California Law Review concerning the history of bank fraud in the United States. Reporter's Transcript ("RT") 2061. *See* Hymanson, *Borrowers Beware: D'Oench, Duhme and § 1823 Overprotect the Insurer When Banks Fail,* 62 So. Cal. L. Rev. 253 (1988).

litigant should have its case determined, after 6 years and a full trial, by an appellate tribunal engaging in seat-of-the-pants *ex cathedra* pronouncements about how it believes banks do or do not act, with no citation to the law, the record, or any other authority.

Latian is appalled that this Court makes these and other unfounded assertions. If the Court is stating a rule of law or following precedent, the citation to the law ought to be provided so that further appellate review will not be frustrated. If the statements are based on evidence at trial, the Court should similarly cite to the record. If the Court is offering expert testimony, it should say so, and then be available for cross-examination.

While paying lip-service to the proper standard of review for cases on appeal,[2] this Court, in its Order, disregards established and controlling California law. The Court omits, misstates, and, in at least one case, creates out of whole cloth critical material facts in the record. This Court has further assumed the roles of jury, trial judge, accounting expert witness, banking expert witness, Portuguese translator, and omniscient observer of conversations known heretofore only to the parties involved.

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[2] On page 2 of the Order, the Court describes this as a "lender liability" case. This fundamental misconception reveals the Court's preconceived ideas about the case and portends its improper attempts to reform the evidence to fit its preconceptions. This is not a lender liability case, which is a newly-developed cause of action based upon a heightened duty of a bank when dealing with its customers. Rather, this case involves two traditional and well-established causes of action – fraud and breach of contract.

First, the Court applies an incorrect de novo standard in reviewing the trial court's determination that the Guaranty Payment Agreement is not an integrated document. Because the trial court's determination is one of *fact*, it must be granted deference by this Court, and may not be overruled unless no evidence supports the factual determination.

Second, in an effort to find some inconsistency between the oral promises of Banco do Brasil ("Banco") and the 1983 Payment Agreement, the Court makes the elementary mistake of confusing "conditional" obligations with conditions precedent. The two are not the same, and case law makes clear that an agreement may contain unconditional obligations, while at the same time the efficacy of the entire agreement is subject to a condition precedent.

Third, this Court stands on its head the principle of "substantial evidence" and completely usurps the function of the jury and determines for itself the credibility of witnesses it never observed. In doing so, the Court fails to follow applicable standards in determining whether evidence is "inherently improbable." Far from indulging in every reasonable inference in order to support the verdict, this Court has gone out of its way to find what it considers to be inconsistencies and improbabilities in the evidence. Instead of looking at the evidence in the light most favorable to Latian, this Court resorts to broad, unsupported statements of how a bank normally acts, and what obligations a bank would certainly put in writing.

Despite *direct* – not circumstantial – evidence from more than one witness on critical issues in this case, and the Court's *own* admission that "[t]here is, however, serious disagreement as to certain critical matters" (Order, p. 7, n. 5), this Court has determined that there was insufficient evidence to support the verdict. In completely disregarding the evidence presented by Latian, this Court ignores long-established California law that allows an appellate court to disregard evidence only where the testimony involves a "physical impossibility" or its falsity is "apparent without resorting to inferences or deductions." *People v. Huston*, 21 Ca1.2d 690, 134 P.2d 758, 759 (1943). Under this standard, the Court cannot disregard Latian's evidence.

Finally, in reweighing the trial evidence, this Court fails to give the trial court's post-trial determinations their required "great weight". Judge Lavine independently reviewed the evidence and concluded the verdict was supported. Moreover, he explicitly determined that the evidence supporting the verdict was *not* inherently improbable. RT 2060-61, 2082-83. This Court fails utterly to give this *factual determination* the deference it is due.[3]

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[3] On page 66 of the Order, this Court states that Latian relied upon "creative (and apparently charismatic) argument." Of course, this is no compliment; it is an unfounded excuse by the Court to explain why the jury found in favor of Latian. This record reflects absolutely no evidence of a verdict swayed by passion or prejudice. Thus, the Court resorts to back-handed rationalizations to support its decision. Is the Court also of the opinion that Judge Mills and Judge Lavine were additional "victims" of charisma?

Perhaps the most striking omission from the Court's recitation of "facts" is the determination of Judge Lavine in his order denying appellants' post-trial motions:

> The Court finds this is a situation in which Stefanon had a strategy to defraud the Sarbaz family as early as 1982 and fully informed his superior of the strategy; the course of conduct of the bank was a deliberate attempt to take advantage of the Sarbaz family; the bank made its representations to Latian repeatedly on every occasion Latian signed a document. After Latian delivered his check for $310,000 to be held in trust until the line of credit was approved, the bank broke its promise by appropriating the $310,000; the bank knew of the culpability throughout the events, as evidenced by Stefanon's contract, written reports, and the top officials, aside from Stefanon, tried to cover up.

Minute Order, September 29, 1989, Clerk's Transcript ("CT") 5360-63. In an attempt to discount the findings of Judge Lavine, the Court notes in footnote 4, page 6, that Judge Lavine "did not have a complete record of [the trial] testimony upon which to make his rulings, but only those portions thereof which the parties had periodically ordered during the trial and were able to make available to him." Far from a reason to discount Judge Lavine's findings, the fact that Judge Lavine found enough evidence to support the verdict in an incomplete transcript of the trial testimony *supports* his findings.

Although the Court's factual mistakes will be discussed in detail below, one stunning error is found on page 66 of the Order. The Court accuses Latian of relying on "documents improperly translated from Portuguese to

English," and without any supporting authority, purports to set out in footnote 20, page 21, the correct translation of the Portuguese in Plaintiff Exhibit ("PX") 54. First, the translations from Portuguese to English were stipulated by both parties. RT 916. Second, the Court is referring to Joao Stefanon's ("Stefanon") testimony on cross-examination when he attempted to disavow the language in the stipulated translation of PX 54. RT 1332-1345. This repudiation was the proper subject of cross-examination, and this Court cannot merely accept as true Stefanon's testimony at trial over the stipulated translation.

Another example of the inadequacy of the treatment of the trial record in the Court's Order is the complete omission of Stefanon's deposition testimony regarding the bank's promise to hold the $310,000 payment by Latian until Banco approved Latian's line of credit. In his deposition, read to the jury at trial, Stefanon acknowledged that the check was not to be cashed until Latian's line of credit had been approved by the head office:

> Q. What was your understanding as to why the Sarbazes were paying to the bank $310,000?
>
> A. Because the Sarbazes wanted to be separate – separated from the Kudsies. And they came to the bank and presented a check for $310,000 that was put in a side account for payment of their commitment with the bank as soon as we would have the approval from the head office for the deal.

RT 1308. At another point in his deposition, Stefanon conceded that the "deal" included both the agreement of Latian to repay Kudsy's debt to Banco, and the agreement

by Banco to grant Latian a line of credit. RT 1384. When confronted with this testimony at trial, however, Stefanon repudiated his prior testimony. RT 1308-09. This Court is not free to disregard the deposition testimony simply because Stefanon changed his story at trial.

The evidence presented by Latian is not "inherently improbable." It is not of such a nature that it cannot be believed by any reasonable person. Judge Lavine believed it, and according to this Court, the jury believed it. (Order, p. 51.) This Court has overstepped its role as a reviewing court, and has, to borrow the Court's own phrase, retried the entire case, resorting to "revisionist claims" because, at the end of this trial, the Court did not "care for the result." (Order, p. 58.) Because of the legal and factual errors contained in the Court's order, this matter must be reheard.

II. LEGAL ANALYSIS

A. THE COURT APPLIED THE WRONG STANDARD IN REVIEWING THE TRIAL COURT'S DETERMINATION THAT THE GUARANTY AGREEMENT WAS NOT INTEGRATED.

Citing California Code of Civil Procedure § 1856(d), the Court states that whether the parol evidence rule applies "so as to exclude any collateral oral agreement is one of law to be determined by the court." (Order, p. 38.) Section 1856(d), however, provides no support for the Court's conclusion. Section 1856(d) provides that whether an agreement is "intended by the parties as a final expression of their agreement" is an issue to be determined by the court, but it says nothing as to whether the

determination is one of law or fact. The Supreme Court of California has said since *Masterson v. Sine*, 68 Cal. 2d 222, 436 P.2d-56[1], 65 Cal. Rptr. 545 (1968), that the issue of whether a written agreement is integrated must be determined by all relevant factual evidence, including the circumstances surrounding the execution of the writing. *See, e.g., Stevenson v. Oceanic Bank*, 223 Cal. App. 3d 306, 272 Cal. Rptr. 757 (Cal. App. 1 Dist. 1990); *Mobil Oil Corp. v. Handley*, 76 Cal. App. 3d 956, 143 Cal. Rptr. 321, 324 (Cal. App. 2 Dist. 1978). Accordingly, "the trial court's ultimate conclusion on the issue of integration is entitled to the same deference on appeal as any other ruling of the court on an issue of fact." *Id.*[4]

This Court is bound by the trial court's determination on the integration issue if it is supported by substantial evidence; this Court certainly is not free to resolve the integration issue de novo. Because this was a factual determination, this Court must view the evidence "in the light most favorable to the trial court's determination, drawing all reasonable inferences and disregarding all contradictory evidence." *In re Marriage of Adkins*, 137 Cal.

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[4] This rule is the majority rule in the United States. *See, e.g., Brennan v. Carvel Corp.*, 929 F.2d 801, 807 (1st Cir. 1991); *United States v. Clementon Sewerage Authority*, 365 F.2d 609, 614 (3d Cir. 1966); *Transamerica Oil Corp. v. Lynes, Inc.*, 723 F.2d 758, 763 (10th Cir. 1983); *Morgan v. Stokely-van Camp, Inc.*, 34 Wash. App. 801, 663 P.2d 1384, 1389 (1983) ("Whether the parties intended the written contract to be the sole agreement is a question of fact."); *Alaska Northern Devel, v. Alyeska Pipeline Serv.*, 666 P.2d 33, 37 (Alaska 1983), *cert. denied*, 464 U.S. 1041 (1984) ("Whether a writing is integrated is a question of fact to be determined by the court in accordance with all relevant evidence.")

App. 3d 68, 75, 186 Cal. Rptr. 818, 821 (Cal. App. 2 Dist. 1982). *See also Campbell v. Southern Pacific Co.*, 22 Cal. 3d 51, 60, 583 P.2d 121, 148 Cal. Rptr. 596 (1978). Thus, in order to reverse the trial court's determination on this issue, this Court must conclude that the trial court had no basis whatsoever in determining that the Guaranty Agreement was not integrated. Under this standard, the Court's Order cannot stand; Judge Mills certainly had evidence before him that supported his conclusion that the Guaranty Agreement was not integrated.

First, the agreement for a line of credit is not an agreement that "would 'certainly' have been included in the writing," and it is exactly the type of agreement that "might 'naturally' have been made separately." *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30, 34 (Cal. App. 4 Dist. 1971). Judge Mills had before him evidence of Banco's course of dealings with the Kudsy Companies. Contrary to this Court's factual representation in footnote 47 of its Order, in granting lines of credit to the Kudsy Companies, Banco entered into separate and distinct agreements covering each line of credit, *not all of which were in writing*.[5] Evidence before Judge Mills and the jury at trial established that the line of credit for one of the Kudsy Companies, Wholesale Auto Parts, Inc., was pursuant to an *oral* agreement, and was not embodied in

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[5] At page 50, at footnote 47, this Court incorrectly states, "Second, the record reflects that the credit line arrangements with Kudsy were all handled as a part of the written documentation. . . . "

or evidenced by a written agreement. CT 2287, Exhibits 47-51, Deposition ("Depo.") of A. Ferral, p. 68.

Banco had an established practice of *not* embodying its agreements for lines of credit in other documents such as promissory notes and guaranties. CT 2287, Exhibit 4; CT 2287, Exhibit 6; CT 2287, Exhibits 47-51. There was not a single agreement embodying all of the rights and obligations of Banco and the borrower under the line of credit. There was a multiplicity of separate and distinct agreements, not all of which were in writing. Such evidence is clearly sufficient to uphold Judge Mills' factual determination, affirmed by Judge Lavine, that the Guaranty Agreement would not certainly have included the parties' agreement concerning a line of credit.

In addition, the Guaranty Payment Agreement is replete with references demonstrating that the parties had a separate agreement granting Latian a line of credit. The Guaranty Agreement incorporates as an exhibit the Security Agreement of September 27, 1982, between Banco and Latian. That agreement explicitly recites that Latian, as Debtor, is granting a security interest to Banco, as Secured Party, "as an inducement to Secured Party to extend credit to Debtor from time to time. . . . " PX 1. "Debtor," as noted by this Court, is defined as Latian. Not only does this Court fail to indulge Judge Mills and Latian all reasonable inferences from this document to support Judge Mills' determination, the Court completely ignores and discounts this document because in the Addendum, the document refers to inducing the secured party to make line of credit facilities available to the

borrowers, and "borrowers" is defined as Kudsy in the body of the Security Agreement.[6]

Relying on the general rule that typed language "controls" the printed language in the Security Agreement, and also on its wholly unsupported finding that the Security Agreement was attached to the Guaranty Agreement as "an historical exhibit," the Court disregards the preliminary language of the Security Agreement. The Court is wrong on two counts. First, there is no inconsistency between the Addendum to the Security Agreement, which refers to Borrowers, and the Security Agreement, which refers to Debtors, i.e., Latian. Thus, the rule cited by the Court to discount the Security Agreement itself, California Civil Code § 1651, does not apply because it only applies where an inconsistency exists between typed and printed material. Second, no evidence supports the Court's conclusion that the Security Agreement was included in the Guaranty Agreement as merely "an historical exhibit." To the contrary, the *typed* language of the Guaranty Agreement states that the Security Agreement is amended so as to include "the obligations evidenced by the Note" within the definition of "Obligations under Paragraph 3 of the Security Agreement." PX 1, p. 2.

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[6] The Court ignored the evidence at trial that supported the inference that the Addendum's reference to Borrowers was a mistake. In 1983, Kudsy was no longer in business and it obviously and beyond any doubt made no sense to view the Addendum as a document contemplating that Kudsy – but not Latian – would be utilizing a line of credit in the future. No reasonable, fair, or impartial person could possibly hold otherwise. And nobody did – Judge Mills did not, the jury did not, and neither did Judge Lavine.

Even Banco's counsel at oral argument clearly and unequivocally admitted that Banco would have made a separate agreement for a line of credit with Latian, rather than include it in the Guaranty Agreement. The Court's Order ignores this admission. During argument, counsel for Banco conceded several times that an agreement for a line of credit, given Banco's normal practices, would be a separate agreement from that signed by Latian in 1983. Certainly, the concessions of Banco on this point are relevant to the discussion, and moreover, should be conclusive. Banco's counsel acknowledged that any agreement for a line of credit would have been the subject of a discrete agreement apart from the agreement to repay the Kudsy debt. This being so, the parol evidence rule has no application in this case.

On Page 50 of its Order, the Court notes:

> It is inconceivable that an additional agreement to extend further credit would not be provided for therein. That a bank, which has gone to such lengths to document an entire debt relationship, would make a cavalier oral commitment, such as is described in respondents' testimony, to provide further open-ended credit is an incredible proposition.

The Court's comments beg the question. First, it is not inconceivable that an additional agreement to extend credit would not be provided in a written document signed by Banco and Latian – Banco did that very thing with the Kudsy Companies. Second, the Court refers to the bank having gone to "such lengths" to document an entire debt relationship; the Guaranty Payment Agreement is three pages long – what other "lengths" the Court

is referring to are anyone's guess. This Court clearly had the preconceived notion that a bank would not make any commitment without putting it in writing, and made that the starting point of its analysis. Of course, there is no evidence in the record to support the Court's generalization. Further, there is also no evidence in the record to support the Court's assumption that banks do not make "cavalier oral commitment[s]" to their customers. Had such generalized "custom and practice" evidence been offered at trial by the bank, it no doubt would have been correctly excluded, or else subject to devastating crossexamination as to what banks actually do and have done in the real world (*e.g.*, the savings and loan debacle, BCCI), of which this Court is apparently woefully in ignorance.

Because the record contains evidence to support Judge Mills' conclusion that the Guaranty Agreement was not integrated, his finding on this fact must be affirmed. Accordingly, this Court's September 27 Order to the contrary must be corrected. Once this Court upholds Judge Mills' determination that the document is not integrated, the parol evidence rule has no application in this case, and provides no basis for excluding any of Latian's evidence.

B. BANCO'S ORAL PROMISES ARE NOT INCONSISTENT WITH THE 1983 PAYMENT AGREEMENT.

This Court holds that the oral agreement "directly contradicts the written instrument." (Order, p. 43.) The Court reasons that since the oral agreement relating to the extension of a $2 million line of credit was claimed by

Latian to have been an indispensable *condition* to its obligations under the written Guaranty Agreement, the oral agreement was "entirely and directly inconsistent with an express term of the integrated written agreement [that] 'Latian and Sarbaz . . . agree that such obligations are absolute and *unconditional.*' " (Order, p. 45.) The Court then concludes that "[i]t is simply not possible to reconcile the respondents' claim of an oral condition on which their liability to Banco depends with their expressed written commitment that there are no conditions to such liability." (*Id.*) The Court completely misapprehends the nature of the condition and misapplies California law as to the admissibility of oral evidence of a condition precedent to an unconditional obligation to pay.

The applicable and correct rule of law is set forth in 3 Corbin on Contracts, § 589:

> A written document, unconditional on its face and fully executed, can be shown by oral testimony to have been delivered subject to a condition precedent.

Thus, in *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30 (Cal. App. 4 Dist. 1971), the California Court of Appeals acknowledged that under California law parol "evidence is admissible to prove a condition precedent – that a contract is not to take effect until a certain condition happens. . . . " *Id.* at 35. Moreover, the Court noted evidence that an *unconditional* promise to pay would be ineffective until a certain event happened is *not* inconsistent with an unconditional promise to pay. *Id.*

Likewise, in *FPI Development, Inc. v. Nakashima*, 231 Cal. App. 3d 367, 282 Cal. Rptr. 508, 525 (Cal. App. 3 Dist. 1991), the Court of Appeals stated:

> . . . there is no necessary contradiction between the statement of an obligation unconditional in form and the statement of a condition to its enforcement, e.g., I am obligated to do an act, *unless* a specified contingency occurs.

Similarly, in *United States v. Hub City Volkswagen, Inc.*, 625 F.2d 213, 215 (9th Cir. 1980), the Ninth Circuit Court squarely held that a written guaranty which stated that the guarantor "unconditionally guarantees" a loan is *not inconsistent* with an oral condition precedent that the guarantee would not become effective until a certain event happened. In so holding the Court stated:

> Appellees emphasize, first, that each guaranty states that the guarantor "unconditionally guarantee[s]" the loan, . . .
>
> Neither of these two clauses, however, had any force until the guaranty became effective. If the guarantors are able to establish at trial that they did in fact have the alleged agreement with the bank officials then neither of these two clauses ever became effective and neither is inconsistent with the oral condition precedent.

625 F.2d at 215.

Contrary to this Court's assertion, the parol evidence rule does not exclude evidence of an oral condition precedent to the effectiveness of an unconditional promise to pay; in this case, the jury found precisely such an oral condition precedent existed to the guarantees executed by Latian and Sarbaz.

C. NO MATTER HOW THIS COURT VIEWS THE PAROL EVIDENCE RULE, BANCO IS NOT ENTITLED TO JUDGMENT REVERSING THE JURY'S DETERMINATION OF LATIAN'S FRAUD CLAIM.

So eager to overturn completely the jury's verdict, the Court fails to notice that even under the Court's analysis of the parol evidence rule, Latian's fraud claims accruing before January of 1983 are not impacted by the 1983 Payment Agreement. By 1983, Latian had incurred $860,000 in damages due to Banco's fraud, and the 1983 Agreement in no way released Banco from its liability.

The 1983 Payment Agreement speaks only of Latian's "unconditional" obligation to pay under *that* agreement. That agreement came into being in January of 1983. By that point, however, Banco had already defrauded Latian, and Latian's claim for fraud had accrued. At trial, Latian's evidence showed that the fraud began in the summer of 1982 and continued throughout the relationship between Latian and Banco. Latian's initial payment to Kudsy of $400,000 was the result of the bank's fraud, and every subsequent payment was a result of the bank's fraud. As of January, 1983, Latian had expended approximately $860,000 as a direct result of Banco's fraud. RT 549-550. This evidence is admissible *regardless* of whether the 1983 Agreement is integrated. The agreement was not a *release* of any claims by Latian. Because Latian's damages for fraud had accrued by that time, under no circumstances does the parol evidence rule require a complete reversal and JNOV on Latian's fraud claim.

D. THE COURT IMPROPERLY DISREGARDED LATIAN'S EVIDENCE SUPPORTING THE JUDGMENT.

This Court concludes that the evidence presented by Latian at trial is not "reasonable in nature, credible, [or] of solid value." (Order, p. 61, quoting *In re Teed's Estate*, 112 Cal. App. 2d 638, 247 P.2d 54, 58 (Cal. App. 2 Dist. 1952).) In reaching this conclusion, however, this Court failed to apply the correct standard in determining whether competent evidence may be disregarded on appeal. The case this Court relies on to support its complete rejection of Latian's evidence, *In re Teed's Estate*, is misconstrued by the Court. In *In re Teed's Estate*, the court did not conclude that the testimony supporting the verdict was unbelievable, but only that the actual testimony did not support the conclusions for which it was admitted. In fact, the court notes that "substantial evidence" is defined in 40 Words and Phrases, as evidence "which, if true, has probative force on the issues." 247 P.2d at 58. Thus, under *In re Teed's Estate*, the determination of whether evidence is true or false is *not* a part of determining whether the evidence is substantial in nature. In fact, the Supreme Court of California noted in *In re Teel's Estate*, 25 Cal. 2d 520, 154 P.2d 384, 388 (1944):

> All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.

See also In re Trefren's Estate, 86 Cal. App. 2d 139, 194 P.2d 574. 575 (Cal. App. 1 Dist. 1948).

Following this standard, the Court must accept as true the evidence most favorable to Latian and discard that evidence unfavorable to Latian. This, the Court has obviously not done. Rather, in the guise of "looking at the record as a whole," this Court has made the determination that the evidence most favorable to Latian is in fact false, something that an appellate court has no authority to do given the facts in this record.

The correct standard is set forth by the California Supreme Court in *People v. Huston*, 21 Cal. 2d 690, 693, 134 P.2d 758, 759 (1943):

> Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation omitted.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations omitted.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations omitted.]

See also Tobola v. Wholey, 75 Cal. App. 2d 351, 170 P.2d 952, 955 (Cal. App. 3 Dist. 1946) (although testimony that is inherently improbable must be disregarded, "such action is warranted only where the testimony involves a physical impossibility or its falsity is apparent without resort

to inference or deduction."); *Butticci v. Schindel Furniture Co.*, 152 Cal. App. 2d 165, 313 P.2d 62, 65 (Cal. App. 1 Dist. 1957) (" . . . the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal upon the ground that the verdict is contrary to the evidence."); *Gallipo v. City of Long Beach*, 164 Cal. App. 2d 70, 330 P.2d 91, 94 (Cal. App. 2 Dist. 1958) ("[w]hen any testimony believed by the trier of the facts relates events which are not completely contrary to human experience or would seem physically impossible, the judgment cannot be reversed on appeal on the ground that such testimony is inherently unbelievable.")

In this case, none of the evidence presented by Latian, either through direct testimony of Manoucher and Amanollah Sarbaz or the cross-examination of Stefanon, presents examples of testimony that relate to events that are physically impossible. There is nothing physically impossible about a bank making an oral promise to a client. The only other legally justifiable reason for this Court completely to disregard Latian's evidence is if the evidence – *without resorting to inferences or deductions* – is obviously false.

The evidence presented by Latian is not obviously false without resort to inference or deduction. The evidence is only improbable if one looks at the testimony with the preconceived notion that a bank would never make an oral promise and, likewise, no one would rely upon an oral promise from a bank. Neither of these assumptions is a self-evident universal truth.

This Court has reviewed and judged the evidence with the predisposition that if only two people in a meeting have a particular recollection of the conversation, which is denied by other people at the meeting, the two people must be giving inherently improbable testimony. This Court has compared the testimony of Manoucher and Amanollah Sarbaz – which is direct evidence of an oral promise to grant Latian a line of credit – with the testimony of bank representatives. For some reason, this Court was predisposed to believe the bank representatives, and not Latian's representatives. The Court went so far as to "contrast" the testimony of Manoucher Sarbaz with that of Stefanon and other witnesses to conclude that Stefanon's version of the July 21 meeting was more "consistent" with other evidence presented. (Order, pp. 12-15, n. 12.) The Court's work should have ended when it set forth the testimony of Manoucher Sarbaz on the July 21 meeting. There is nothing in this testimony that is either at variance with physical facts or is repugnant on its face.[7]

---

[7] Substantial evidence may consist of the testimony of a single witness, even if that one witness is the testimony of a party. *See, e.g., In re Marriage of Kahan*, 174 Cal. App. 3d 63, 68, 219 Cal. Rptr. 700, 704 (Cal. App. 6 Dist. 1985); *Muffett v. Royster*, 147 Cal. App. 3d 289, 303, 195 Cal. Rptr. 73, 81 (Cal. App. 2 Dist. 1983); *Coldwell, Banker & Co. v. Pepper Tree Office Center Associates*, 106 Cal. App. 3d 272, 277, 165 Cal. Rptr. 51, 54 (Cal. App. 4 Dist. 1980); *Clark Equipment Co. v. Wheat*, 92 Cal. App. 3d 503, 518, 154 Cal. Rptr. 874, 881 (Cal. App. 1 Dist. 1979).

The Court finds that the "respondents' version was neither reasonable nor credible." In reaching this conclusion, the Court found that Stefanon's denial that a line of credit was ever promised at the meetings of June 14, July 21, and August 25, 1982, was more believable and more consistent with other evidence than was the Sarbazes' testimony. The Court also found, unaided by any evidence in the record, that "[t]hese circumstances are consistent with common banking practices,. . . . " (Order, p. 62.) Of course to come to the conclusion that the bank never promised a line of credit to Latian, the Court had to pick and choose from the various versions of the facts testified to by Stefanon. This is improper, and an improper review of "the entire record." The Court may not so weigh the evidence on appeal.

The following is a list of other instances where the Court improperly compares, contrasts, ignores, or in some way explains away testimony that any rational and unbiased person would accept as evidence that supports the verdict:

1. On pp. 10-11, the Court notes that Manoucher testified that at the initial meeting between the Sarbazes and Banco, Manoucher asked Stefanon, "If and when we buy it [i.e., Kudsy], would you cooperate with us? Would you let us assume the line of credit?" Manoucher testified that Stefanon replied, "If and when you buy the business, we will cooperate with you. And there should be no problem to let you assume the line of credit. . . . There are some paper works and formality you have to do with the head office, but there would

be no problem and we would cooperate with you." From this testimony, this Court concludes that no one at trial disputed that there was no discussion at that time of Latian having a line of credit. The testimony quoted by the Court clearly indicates that it was understood Latian would assume the line of credit, i.e., step into the shoes of Kudsy. This is far different from the tortured construction the Court gives the testimony that Stefanon was only saying that Latian could use Kudsy's existing line of credit if Latian was working with Kudsy.

2. On p. 11, the Court states that Kudsy's existing line of credit was entirely drawn down except for "$150,000 and would be of no practical importance without substantial pay-downs to Banco." Here, the Court makes a wholly unsupported conclusion regarding the importance of any revolving line of credit to Latian, which is directly contrary to the evidence admitted at trial. This comment indicates that the Court does not understand how a revolving line of credit works. For an explanation of the value of a revolving line of credit to Latian, see the trial testimony of Manoucher Sarbaz, RT 962-66.

3. On p. 12, the Court states, "Manoucher requested that Latian be allowed to assume the credit line and Stefanon responded that Banco's head office would have to approve any additional credit and that the respondents would have to provide adequate financial information." By this statement,

the Court has completely disregarded Manoucher's testimony that Stefanon told him that head office approval was a mere "formality."

4. On p. 12, n. 12, this Court "contrasts" the testimony of Manoucher with that of Stefanon and Nagata, and finds that Stefanon's testimony is more consistent with the weight of the evidence. Of course, this Court is not permitted to weigh the evidence, and inconsistencies in testimony among witnesses is not an adequate reason to disregard evidence.

5. On p. 13, n. 13, this Court concludes that Nagata's testimony "rejects" any "private conversation" between Amanollah Sarbaz and Stefanon. Nagata did not testify he had Amanollah in sight at all times during the meeting and certainly gave no opinion as to whether Amanollah and Stefanon spoke privately. A private conversation between the two men is not on its face "inherently improbable."

6. On p. 16, the Court states that " . . . Banco's representatives who attended the closing stated, on Stefanon's instructions, that Banco would not oppose the transaction (i.e., the transfer of the inventory to Latian and its assumption of the secured inventory liability). . . . " This statement by the Court completely disregards Stefanon's deposition testimony that he understood the "transaction" to involve two integrated points: (1) that the Sarbazes purchase the

Kudsy Companies, and (2) that the Sarbazes be given credit from the bank. RT 1384.

7. On p. 18, n. 16, the Court acknowledges the August 11, 1982, letter from Koudsi and Antoci to Banco, PX 10. This letter acknowledges the intent of everyone at that time that Latian would be receiving a line of credit from Banco. This evidence is ignored by the Court.

8. On p. 19, the Court states that Stefanon denied that the Sarbazes ever gave the $310,000 check to be held in escrow until the bank approved Latian's line of credit. By making this statement, the Court improperly ignores Stefanon's deposition testimony in which he states that the check was to be put into a side account until the bank approved the complete transaction, as understood by Stefanon to be both the transfer of the Kudsy businesses to Latian and the line of credit from Banco to Latian.

9. On p. 23, n. 23, the Court asserts that the assumption of Kudsy's indebtedness "was the idea of the respondents, not Banco." This "testimony" is found nowhere in the record. Every offer made to Kudsy to purchase its assets included a provision that Banco must approve the transaction, and at the very beginning, Latian was interested in the business in large part because of the available $2 million line of credit. The evidence supports Latian's contention at trial that once Banco met the Sarbazes, it did all it could to entice Latian into taking over

the debt of Kudsy by promising the $2 million line of credit, and had that strategy from the beginning.

10. On p. 28, in the body of the Court's Order, the Court states that according to Stefanon, the information that Latian's line of credit had been refused was "immediately communicated to Manoucher by telephone. . . . " Only in footnote 31 does this Court mention that Manoucher denied that he was ever advised by Stefanon prior to June of 1983 that the credit line had been refused.

11. On p. 43, this Court points out that Manoucher testified that the line of credit from Banco was critical to Latian's purchase of the Kudsy inventory, and in fact Latian would not have been interested in the Kudsy Companies without the line of credit. Rather than reasonably infer that a good business person would never have bought the companies without first ensuring that the line of credit was going to be available, this Court infers the opposite and concludes from the absence of a written agreement, that the agreement obviously was never made.

12. On p. 60, in n. 54, the Court concludes that a review of Stefanon's deposition testimony "in context" reflects that his testimony was directed at Banco's approval of Latian's assumption of Kudsy's outstanding indebtedness, i.e., "loan", and not the line of credit at issue in the trial. This is completely conclusory on the part of this Court, and in fact flies in the face of Stefanon's testimony. During his deposition, his own

> counsel clarified that when counsel for Latian used the term "approved the loan," what was meant was 'approved the line of credit.' " RT 1293-94.

The Court also finds that the conduct of the respondents is inconsistent with their testimony that the $2 million line of credit was crucial to their purchase of the Kudsy assets. The Court finds it curious and incredible that Latian would not have requested its counsel to put such a promise in writing. (Order, p. 63.) Of course, this is sheer speculation on the Court's part, and nothing in the record compels the conclusion that it would be incredible for Latian to rely on an oral promise. In fact, the only evidence concerning this issue was the testimony of Amanollah Sarbaz, who testified that in building his businesses in Iran, he dealt on a verbal and hand-shake basis in arranging for and using lines of bank credit. RT 516-519, 611-12.

Likewise, without any testimony to support its statement, the Court notes on page 64: "A major extension of new credit would reasonably, if not obviously, require the submission of written financial statements justifying it." Again, nothing in the record supports this assumption, and in fact Manoucher Sarbaz denied that Banco ever made it a requirement of receiving the line of credit that financial statements be given to the bank. The evidence at trial supported the inference that it would be *reasonable* for Latian to rely on the bank's promise of a line of credit without providing the bank with financial statements. Banco told Latian that there would be no problem with obtaining a line of credit; the bank knew from the Kudsy Companies that the Sarbazes had substantial wealth, and

that they were very successful businessmen in Iran. Moreover, it is not *unreasonable* to assume that Banco would be happy with *anyone* taking over the debt of the Kudsy Companies given Banco's knowledge that the Kudsy Companies were in financial trouble.

Finally, the Court concludes its comments regarding the sufficiency of Latian's evidence by asking the following questions, and answering them, again without any support for the generalizations made:

> Does the self-serving claim of the respondents make any sense? Would a bank which has so meticulously documented every aspect of a transaction commit itself orally and so casually to such an important obligation? We think not. Banks simply do not do business that way.

(Order, p. 66.) Again. the record is devoid of any evidence to support a generalization of how banks do business. Moreover, if any witness at trial had attempted to offer such evidence, that witness would have immediately been subject to cross-examination concerning the myriad of established instances of bank fraud in the United States and the world in the past ten years.

E. THE COURT FAILS TO GIVE THE TRIAL COURT'S DECISIONS THEIR REQUIRED WEIGHT.

Pursuant to § 661 of the Cal. Code of Civ. Proc., Judge Lavine ruled on Banco's post-trial motions, and specifically found that the evidence supported the jury's finding on liability and compensatory damages. A trial court's denial of the motion for a new trial must be given

great weight. *E.g., Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 364 P.2d 337, 342, 15 Cal. Rptr. 161, (1961) *Torres v. City of Los Angeles*, 58 Cal. 2d 35, 372 P.2d 906, 917, 22 Cal. Rptr. 866 (1962); *Sturges v. Charles L. Harney, Inc.*, 165 Cal. App. 2d 306, 331 P.2d 1072, 1082 (Cal. App. 1958). Instead of following this established standard of review, this Court has utterly ignored and disregarded the findings of Judge Lavine.

The only attack this Court makes on Judge Lavine's findings is that he did not have the entire trial transcript at his disposal when ruling on the post-trial motions. This fact, however, is no legal attack on his determinations. The California Code of Civil Procedure recognizes that a trial transcript will not always be available within the 60-day period allowed for post-trial motions, and the legislature made provision for an alternative method of providing a Court with the factual basis to rule on such post-trial motions. Section 660 provides that if a transcript is not available, "the reporter must upon request of the Court or either party, attend the hearing of the motion and shall read his notes, or such parts thereof as the court, or either party, may require." If a transcript is not available, a party moving for a new trial must avail itself of the right to call the court reporter. Banco did subpoena the court reporter, and at the hearing for a new trial, the court reporter was in attendance. At no point during the hearing did Banco request the reporter to read his notes. *See In re Marriage of Liu*, 197 Cal. App. 3d 143, 242 Cal. Rptr. 649, 654 (Cal. App. 6 Dist. 1987), where the Court recognized that the ability to have the reporter read portions of the transcript is an adequate substitute for the transcribed transcript.

CCCP § 661 provides that if the judge who presided at trial is unable to hear the motion for a new trial, that motion shall be heard and determined "by any other judge of the same court." Judge Lavine had full power in making his determinations on the post-trial motions; they must be given the weight they are due. This, the Court has not done to date.

III. CONCLUSION

This Court's Order of September 27, 1991, displays an unprecedented disrespect for the Seventh Amendment of the Constitution of the United States, California law, the jury system, California juries, California trial judges, and the rights of litigants. In reaching its decision, this Court has revived arguments waived by Banco, believed the impeached testimony of Stefanon, who was found personally liable for Banco's fraud, ignored factual findings of other judges, and misstated facts, and misapplied law. Latian is entitled to a rehearing.

Dated: October 14, 1991

Respectfully submitted,

NICHOLAS R. ALLIS, ESQ.
JOSEPH M. ALIOTO, ESQ.
GRAY, PLANT, MOOTY, MOOTY
& BENNETT, PA.

By /s/ Daniel R. Shulman
Daniel R. Shulman
Penny M. Tibke
Richard G. Braman

Attorneys for respondents
and cross-appellants
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: (612) 343-2800

SUPREME COURT OF CALIFORNIA

Civil No. B 045477

BANCO DO BRASIL, S.A., Los Angeles Agency, a Banking association organized and existing under the laws of Brazil,

Plaintiff/Cross-Defendant/Appellant,

JOAO STEFANON, an individual,

Cross-Defendant/Appellant,

LATIAN, INC., a California corporation; AMANOLLAH SARBAZ, an individual; DOES 1-20, inclusive,

Defendant/Cross-Complainants/
Respondents and Cross-Appellants.

Appeal from the Court of Appeals
of the State of California
Appellate Justice Croskey
Concurrences by Justices Klein, P.J. and Danielson

RESPONDENTS' AND CROSS-APPELLANTS' PETITION FOR REVIEW

GRAY, PLANT,
MOOTY, MOOTY
& BENNETT, P.A.
DANIEL R. SHULMAN
RICHARD G. BRAMAN
PENNY M. TIBKE
3400 City Center
33 South Sixth Street
Minneapolis, MN 55402
(612) 343-2800

JOSEPH M. ALIOTO, ESQ.
Forty-third Floor
600 Montgomery Street
San Francisco, CA 94111
(415) 434-8900

NICHOLAS ALLIS, ESQ.
11601 Wilshire Boulevard
Suite 1830
Los Angeles, CA 90025
(213) 477-1200

Attorneys for Respondents and Cross-Appellants

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Pursuant to California Rules of Court 28 and 29, Respondents and Cross-Appellants ("Latian") hereby petition this Court for review of the decision of the Court of Appeals in this matter, filed September 27, 1991 ("Order"). Latian went to the Court of Appeals with a judgment of $10.5 million in its favor. It left with a judgment of more than $2 million against it, with no right even to a new trial. The basis for the Appellate Court's decision was its *a priori*, undocumented, and unsupported view that "Banks simply do not do business that way." To redress this affront to justice and the judicial process, Latian petitions this Court for review.

This case involves claims of fraud and breach of contract by Latian against a Brazilian bank, appellant Banco do Brasil ("Banco"), owned 51% by the Government of Brazil, arising out of a transaction whereby Latian agreed to purchase the assets, and assume certain liabilities to Banco, of the Kudsy Companies – a customer of Banco in financial distress. Latian alleged, and the jury found, that Banco fraudulently induced Latian to proceed with this transaction by falsely promising to provide Latian with a $2 million line of credit previously given to the Kudsy Companies. The jury found the promise to

constitute fraud, and the failure to provide the line to be a breach of contract. The trial court, in denying Banco's post-trial motions, concurred, with extensive specific findings.

> "The court finds this is a situation in which Stefanon had a strategy to defraud the Sarbaz family as early as 1982 and fully informed his superior of the strategy; the course of conduct of the bank was a deliberate attempt to take advantage of the Sarbaz family; the bank made its representations to Latian repeatedly on every occasion Latian signed a document. After Latian delivered his check for $310,000 to be held in trust until line of credit was approved, the bank broke its promise by appropriating the $310,000; the bank knew of the culpability throughout the events, as evidenced by Stefanon's contract written reports, and [that] the top officials, aside from Stefanon, tried to cover up." (Clerk's Transcript ("CT") 5360-5363.)

Concluding, without citation to authority of any kind, whether of law or fact, that "Banks simply do not do business that way," (Order, p. 66) the Appellate Court reversed on the ground of parol evidence, which Banco had not even briefed in its opening and reply briefs. From this wholly improper "trial by appellate court," Latian petitions this Court for review.

I. INTRODUCTION/ISSUES PRESENTED FOR REVIEW

In a patently result-oriented opinion, the Appellate Court ignored and disregarded the evidence supporting

the jury's verdict, improperly substituted itself as a *de novo* factfinder, and misapplied California law governing appellate review of a jury verdict. Only by so doing could the Appellate Court conclude that Latian's "version was neither reasonable nor credible." (Order, p. 62.)[1] Six years of litigation and a four-week jury trial notwithstanding, the Appellate Court assumed the role of factfinder and, based upon *ex cathedra* assumptions about "common banking practices," (Order, p. 62) contradicted by the evidence at trial, decided that the jury reached the wrong verdict. This Court must review the decision of the Appellate Court to assure uniformity in the standards of review applied by California appellate courts, and to correct the critical misstatements and omissions of fact committed by the Appellate Court[2]

Issues Presented for Review

1. May an appellate court disregard a trial court's finding of fact that a written agreement was not integrated, when the trial court's finding was supported by substantial evidence?

2. Is an oral condition precedent to the efficacy of a written promise to pay, unconditional in

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[1] This conclusion was specifically rejected by the trial court in response to Banco's post-trial motions. See quote in text, above.

[2] The Appellate Court's misstatements and omissions of material fact were pointed out to the Appellate Court, Pursuant to California Rule of Court 27, in a Petition for Rehearing timely filed by Latian. Latian's Petition for Rehearing was denied on October 28, 1991.

form, inconsistent with the written promise and therefore inadmissible under the parol evidence rule?

3. May an appellate court disregard evidence accepted by a jury in favor of evidence rejected by the jury, because the appellate court considers the evidence rejected by the jury more credible?

4. May an appellate court disregard the trial court's denial of a new trial motion on the ground that the trial court did not have a full transcript before it when ruling on the post-trial motions?

II. THE JURY'S VERDICT AT TRIAL

Trial commenced in this action on June 12, 1989, before Judge Mills and a jury. At the conclusion of trial, the Court submitted special interrogatories to the jury. (CT 3672-3674.) On July 12, 1989, the jury rendered its verdict. Banco went to the jury on two causes of action: (1) for money owed on promissory notes and guarantees, and (2) for fraud against Latian, Amanollah Sarbaz, and Manoucher Sarbaz for allegedly signing the promissory notes and guarantees with no intention to pay. The jury found against Banco and in favor of Latian on both causes of action. Latian went to the jury on two causes of action: (1) breach of contract, and (2) fraud[3] The jury

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[3] In its decision, the Appellate Court mischaracterized this as a "lender liability" case by Latian. (Order, P. 2.) It is not. Latian's claims raise no special issues of lender duties and obligations to borrowers. Latian's claims are basic fraud and

(Continued on following page)

found in favor of Latian on both its claims. The jury awarded $1.9 million in damages for fraud, $3.6 million for breach of contract, $22 million in punitive damages against Banco, and $500,000 in punitive damages against Banco's managing agent in Los Angeles, Joao Stefanon ("Stefanon").

Judgment was entered on the verdict on July 12, 1989. (CT 3663, 3675.) On August 15, 1989, Banco moved for judgment notwithstanding the verdict or a new trial on numerous grounds, many of which were abandoned on appeal. (CT 4150-4208; 4248-4343.) Before the motions could be heard, Judge Mills became incapacitated, and was replaced on the case by Judge Lavine. During the final week in which Judge Lavine had jurisdiction to hear post-trial motions, Banco filed three additional motions to have the verdict set aside. (CT 5272-5288; 5348-5355; 5393-5429.) Judge Lavine denied all of Banco's post-trial motions, with the exception of the motion directed at the issue of punitive damages. Judge Lavine remitted the punitive damages against Banco to $5 million. (Reporter's Transcript ("RT") 2029-2085; CT 5266-5268.) As to Stefanon, Judge Lavine remitted the punitive damages to $5 solely because of the absence of proof as to Stefanon's net

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breach of contract claims against a bank. The only exotic or unusual aspect of the case is that the bank is foreign, 51% owned by the Government of Brazil. This circumstance, however, has no impact on the straightforward and unremarkable nature of the law to be applied. Obviously, foreign banks that avail themselves of the privilege of doing business in this state must expect to comply with the most basic and time honored precepts of the law of fraud and contract.

worth. (CT 5360-5363; 5476-5478.) In lieu of submitting to a new trial, Latian accepted the remittiturs as to both Banco and Stefanon. (CT 5336-5339; 5483-5485.)

III. THE OPINION OF THE APPELLATE COURT

In overturning the jury's verdict, the Appellate Court made the following alternate "findings" contrary to the jury and Judges Mills and Lavine:

> (1) A Guaranty Payment Agreement executed by the parties in January 1983 was a fully integrated document, so that any evidence of an oral agreement inconsistent with the Guaranty Payment Agreement could not be considered under the parol evidence rule; and
>
> (2) Even if properly admitted, the evidence was insufficient to meet the standard of substantial evidence required to sustain the verdict.

In finding that the Guaranty was "fully integrated" the Appellate Court failed to give proper deference, under California law, to the trial court's finding of fact that this Agreement was *not* integrated. In finding the evidence insufficient under the standard of substantial evidence, the Appellate Court disregarded the evidence favorable to Latian in support of the jury verdict, relied upon evidence rejected by the jury, and misapplied California law. Finally, the Appellate Court's opinion is replete with misstatements and omissions of material fact, from the first page – where Latian's claims are incorrectly described as "lender liability" – to the end of the opinion where the Appellate Court states that "there was no evidence whatever of any false representation by Banco or Stefanon and certainly there was no solid or

credible evidence of an intent to defraud," (Order at 67) – all arising from the Court's outrageous *a priori* prejudgement that "Banks simply do not do business that way."

No civil litigant in the courts of the State of California should go through a four-week jury trial and review by two trial court judges, and then be deprived of a substantial verdict by an Appellate Court that, without regard to either the law or the evidence, declares that "Banks simply do not do business that way," and reverses the judgment on that basis. As this country digs out from under the wreckage of Columbia Savings, BCCI, and the rest of the savings and loan debacle – a veritable saturnalia of bank misfeasance, fraud, and greed – the Appellate Court in this case creates a world-wide safe harbor for all such rogues and scoundrels by announcing California's new rule of law: "Banks simply do not do business that way." Moreover, this so-called rule will be of particular comfort to Banco's principal owner, the world's largest third-world debtor in default, with defaulted obligations of $113 billion, $60 billion of which is owed to commercial banks in the United States, who will now find themselves the major victims of the new California Rule. (*New York Times*, Oct. 25, 1990.) The word can now go out that off-shore banking is no longer necessary; these banks are welcome in California, where the courts will tell their defrauded customers that "Banks simply do not do business that way." This Court must grant review at least to address this most remarkable, fatuous, and downright wrong proposition, unsupported by any citation whatever to legal or factual authority, and made wholly without any opportunity for cross-examination. Latian deserves at least this much consideration

before it is not only deprived of a $10.5 million judgment, but subjected to a multi-million dollar judgment against it in favor of Banco.

IV. THE GUARANTY PAYMENT AGREEMENT WAS FOUND BY THE TRIAL COURT *NOT* TO BE FULLY INTEGRATED: THIS FINDING WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND NO BASIS EXISTED FOR ITS REVERSAL ON APPEAL

Whether a written agreement is integrated must be determined by all relevant factual evidence, including the circumstances surrounding the execution of the writing. *See, e.g., Stevenson v. Oceanic Bank,* 223 Cal. App. 3d 306, 272 Cal. Rptr. 757 (Cal. App. 1 Dist. 1990); *Mobil Oil Corp. v. Handley,* 76 Cal. App. 3d 956, 143 Cal. Rptr. 321, 324 (Cal. App. 2 Dist. 1978). Accordingly, "the trial court's ultimate conclusion on the issue of integration is entitled to the same deference on appeal as any other ruling of the court on an issue of fact." *Id.*[4]

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[4] This is also the majority rule in the United States. *See, e.g., Brennan v. Carvel Corp.,* 929 F.2d 801, 807 (1st Cir. 1991); *United States v. Clementon Sewerage Authority,* 365 F.2d 609, 614 (3d Cir. 1966); *Transamerica Oil Corp. v. Lynes, Inc.,* 723 F.2d 758, 763 (10th Cir. 1983); *Morgan v. Stokely-Van Camp, Inc.,* 34 Wash. App. 801, 663 P.2d 1384, 1389 (1983) ("[w]hether the parties intended the written contract to be the sole agreement is a question of fact."); *Alaska Northern Devel. v. Alyeska Pipeline Serv.,* 666 P.2d 33, 37 (Alaska 1983), *cert. denied,* 464 U.S. 1041 (1984) ("[w]hether a writing is integrated is a question of fact to be determined by the court in accordance with all relevant evidence.")

The Appellate Court was not free to resolve the integration issue *de novo,* but rather was bound by the trial court's determination if it was supported by substantial evidence. In resolving whether the trial court's determination was supported by "substantial evidence", the Appellate Court was required to view the evidence "in the light most favorable to the trial court's determination, drawing all reasonable inferences and disregarding all contradictory evidence. *In re Marriage of Adkins,* 137 Cal. App. 3d 68, 75, 186 Cal. Rptr. 818, 821 (Cal. App. 2 Dist. 1982); *see also, Campbell v. Southern Pacific Co.,* 22 Cal. 3d 51, 60, 583 P.2d 121, 148 Cal. Rptr. 596 (1978). In reversing the trial court's determination, the Appellate Court simply disregarded the substantial evidence in the record supporting the finding of non-integration.

The Guaranty Payment Agreement itself is rife with references demonstrating that the parties had a separate agreement granting Latian a line of credit. The Guaranty Payment Agreement expressly incorporates as an exhibit the Security Agreement of September 27, 1982, between Banco and Latian. That Agreement explicitly recites that Latian, as Debtor, is granting a security interest to Banco, as Secured Party, "as an inducement to Secured Party to extend credit to Debtor from time to time. . . . (Plaintiff Exhibit ("PX") 1.) Instead of relying on this document as evidence to support the trial-court's determination of non-integration relative to a line of credit, the Appellate Court entirely disregarded it because the Addendum to the Guaranty Payment Agreement contained a reference to Banco making line of credit facilities available to "borrowers," defined in the body of the Security Agreement as Kudsy, not Latian. Disregarding evidence supporting

the trial court's determination in favor of other "evidence" arguably contrary amounts to an impermissible "weighing" of the evidence by the Appellate Court.

Underscoring the great lengths the Appellate Court went to to disregard the evidence in support of the trial court's determination of non-integration is the fact that the Appellate Court also ignored the *admissions* of Banco's counsel on appeal that an agreement for a line of credit, given Banco's normal practices, *would be a separate agreement* from the Guaranty Payment Agreement; Banco's counsel admitted, consistent with the evidence, that any agreement for a line of credit would have been the subject of an agreement separate and distinct from the Guaranty Payment Agreement relative to the Kudsy debt. The Appellate Court simply cast this admission of Appellant's counsel aside because, *in the opinion of the Appellate Court* (and *contrary* to the evidence), banks do not make such oral agreements.

> "That a bank, . . . would make a cavalier oral commitment, such as is described in respondents' testimony, . . . is an incredible proposition.

(Order, p. 50.)

The Appellate Court clearly had the preconceived notion that a bank would not make any commitment without putting it in writing, and made that the starting point of its analysis. Of course, there is *no evidence* in the record to support the Appellate Court's generalization or the Appellate Court's assumption that banks do not make

"cavalier oral commitment[s]" to their customers.[5] Had such generalized "custom and practice" evidence been offered at trial by the bank, it no doubt would have been correctly excluded, or else subject to devastating cross-examination as to what banks actually do and have done in the real world (*e.g.*, Columbia Savings, BCCI), of which the Appellate Court was either deliberately or woefully in ignorance.

The evidence before the trial court was clearly sufficient to establish both that (1) Banco had *orally* granted the Kudsy Companies line of credit facilities separate and distinct from written payment agreements; and (2) for Banco, the line of credit agreement with Latian was not one that "would 'certainly' have been included in writing," and that it was exactly the type of agreement that "might 'naturally' have been made separately." *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30, 34 (Cal. App. 4 Dist. 1971). The evidence before the trial court and the jury clearly established that Banco and Kudsy had entered into separate and distinct agreements

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[5] Another material fact overlooked by the Appellate Court is that Banco was making its oral commitments to Latian to induce it to assume millions of dollars of debt of one of its failing customers – Kudsy. Clearly the Bank was motivated to make such representations and commitments to Latian. *See* fn. 1, *supra*.

covering each line of credit, *at least one of which was oral,*[6] (CT 2287, Exs. 47-51, Deposition ("Depo.") of A. Ferral, p. 68.)

Banco had an established practice of *not* embodying its agreements for lines of credit in other documents such as promissory notes and guarantees. (CT 2287, Ex. 4; CT 2287, Ex. 6; CT 2287, Exs. 47-51.) There was not a single agreement embodying all of the rights and obligations of Banco and a borrower under a line of credit. There was a multiplicity of separate and distinct agreements, not all of which were in writing. Because the record contained substantial evidence supporting the trial court's conclusion that the Guaranty Payment Agreement was not integrated, its finding of that fact should have been affirmed and the parol evidence rule should not have been used by the Appellate Court to exclude any of Latian's evidence.[7]

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[6] The Appellate Court misstated this material fact when it incorrectly stated at p. 50, fn. 47, that "the record reflects that the credit line arrangements with Kudsy were *all* handled as a part of the written documentation. . . . " (emphasis herein supplied unless otherwise stated.) This was wrong, as Latian pointed out repeatedly and at length in its filings with the Appellate Court.

[7] That the parol evidence rule even became an issue on appeal further demonstrates that the Appellate Court prejudged this case and issued an Opinion that attempts to justify the result the Appellate Court wanted to reach, even though substantial evidence supported the jury's verdict. Banco had waived any argument regarding the parol evidence rule by failing to raise it in its briefs on appeal. The only mention of the parol evidence rule in Banco's opening brief is found in a footnote at page 46, where Banco attempts to incorporate all of

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V. BANCO'S ORAL PROMISES ARE NOT INCONSISTENT WITH THE WRITTEN GUARANTY PAYMENT AGREEMENT

Having resurrected the parol evidence issue and rejected the trial court's finding of fact that the Guaranty Payment Agreement was not integrated, the Appellate Court then "created" an inconsistency between the oral agreement for a line of credit and the Guaranty Payment Agreement so that the parol evidence rule could then be relied upon to exclude Latian's evidence of Banco's agreement to provide the $2 million line of credit. In so doing, the Appellate Court misstated the evidence in the record and misapplied California law.

The Appellate Court held that the oral agreement "directly contradicts the written Guaranty Agreement." (Order, p. 43.) To support this conclusion, the Appellate

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its arguments to the trial court on this issue. As Latian pointed out, this is an improper method of raising or preserving the parol evidence issue for appeal. *Balesteri v. Holler*, 87 Cal. App. 3d 717, 719-21, 151 Cal. Rptr. 229, 230-32 (Cal. App. 1 Dist. 1978); *Biljac Associates v. First Interstate Bank of Oregon*, 218 Cal. App. 3d 1410, 267 Cal Rptr. 819, 825 (Cal. App. 1 Dist. 1990); *Huntington Landmark Adult Community Ass'n v. Ross*, 213 Cal. App. 3d 1012, 261 Cal. Rptr. 875, 880 (Cal. App. 4 Dist. 1989); *Seritis v. Hotel and Restaurant Employees and Bartenders Union, Local 28*, 167 Cal. App. 3d 78, 213 Cal. Rptr. 588, 593 (Cal. App. 1 Dist. 1985), *cert. denied*, 474 U.S. 1060 (1986); *Smith v. Vallejo General Hosp.*, 170 Cal. App. 3d 450, 459, 216 Cal. Rptr. 189, 194 (Cal. App. 1 Dist. 1985).

Not to be frustrated in its result-oriented efforts, however, the Appellate Court resurrected the issue and asked the parties to brief it following oral argument.

Court reasoned that since the oral agreement for a $2 million line of credit was claimed by Latian to have been an indispensable *condition* to its obligations under the written Guaranty Payment Agreement, the oral agreement was "entirely and directly inconsistent with an express term of the integrated written agreement [that] 'Latian and Sarbaz . . . agree that such obligations are absolute and *unconditional*.' " (Order, p. 45, emphasis in original.) The Appellate Court concluded that "[i]t is simply not possible to reconcile the respondents' claim of an oral condition on which their liability to Banco depends with their expressed written commitment that there are no conditions to such liability." (*Id.*) The Appellate Court completely misapprehended the nature of the condition and misapplied California law as to the admissibility of parol evidence of a condition precedent to a written obligation to pay, unconditional on its face.

The applicable and correct rule of law is set forth in 3 Corbin on Contracts, § 589:

> A written document, unconditional on its face and fully executed, can be shown by oral testimony to have been delivered subject to a condition precedent.

Thus, in *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30 (Cal. App. 4 Dist. 1971), the California Court of Appeals acknowledged that under California law parol "evidence is admissible to prove a condition precedent – that a contract is not to take effect until a certain condition happens. . . . " *Id.* at 35.

The Ninth Circuit faced precisely the issue "created" by the Appellate Court here, in *United States v. Hub City*

Volkswagen, Inc., 625 F.2d 213, 215 (9th Cir. 1980), and squarely held that a written contract containing an express provision that the guarantor "unconditionally guarantees" the loan *is not inconsistent* with parol evidence of an oral condition precedent that the guarantee would not become effective unless a certain event happened.[8] Similarly, in *FPI Development, Inc. v. Nakashima*, 231 Cal. App. 3d 367, 282 Cal. Rptr. 508, 525 (Cal. App. 3 Dist. 1991), the Court of Appeals observed that "there is no necessary contradiction between the statement of an obligation unconditional in form and the statement of a condition to its enforcement. . . . "

Yet again, it is clear that the Appellate Court's opinion was result-oriented, creating issues that simply do not exist to justify the result it wanted to reach. Contrary to the Appellate Court's assertion, the parol evidence rule does not exclude evidence of an oral condition precedent to the efficacy of a written promise to pay, unconditional on its face; in this case, the jury (and the trial court) found precisely such an oral condition precedent existed to the Guaranty Payment Agreement executed by Latian and Sarbaz. The parol evidence rule does not render Latian's evidence of the oral condition precedent inadmissible because the oral condition precedent is not inconsistent with the written guaranty, unconditional in form. *Coast Bank v. Holmes, supra; United States v. Hub City Volkswagon, supra; FPI Development v. Nakashima, supra.*

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[8] The Ninth Circuit noted in *Hub City* that California law and federal law were identical on this issue. Id., 625 F.2d at 214, fn. 2.

VI. THE APPELLATE COURT IMPROPERLY DISREGARDED LATIAN'S EVIDENCE SUPPORTING THE JUDGMENT

The Appellate Court (contrary to the findings of the jury and the trial court) concluded that the evidence presented by Latian at trial is not "reasonable in nature, credible, [or] of solid value." (Order, p. 16, quoting *In re Teed's Estate*, 112 Cal. App. 2d 638, 247 P.2d 54, 58 (Cal. App. 2 Dist. 1952).) In reaching this conclusion, however, the Appellate Court totally misapplied (indeed, turned on its head) the correct standard for determining sufficiency of the evidence on appeal. The standard for determining sufficiency of the evidence on appeal has been stated by the Supreme Court of California as follows:

> All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.

In re Teel's Estate, 25 Cal. 2d 520, 154 P.2d 384, 388 (1944); *see also, In re Trefren's Estate*, 86 Cal. App. 2d 139, 194 P.2d 574, 575 (Cal. App. 1 Dist. 1948).

In this case, the Appellate Court did exactly the opposite of what it was required to do in reviewing the sufficiency of the evidence. Instead of accepting "the evidence most favorable to the respondent . . . as true," and discarding unfavorable evidence "as not having sufficient verity to be accepted by the trier of fact," the Appellate Court here rejected the evidence favorable to respondent as not "reasonable in nature" and adopted the

very evidence rejected by the trier of fact. Simply stated, the Appellate Court perverted the standard of review to reach the result it desired, contrary to established California law.

The correct standard for rejection by an Appellate Court of testimony accepted by the trier of fact is set forth by the California Supreme Court in *People v. Huston*, 21 Cal. 2d 690, 693, 134 P.2d 758, 759 (1943):

> Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable testimony which merely discloses unusual circumstances does not come within that category. [Citation omitted.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, *there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.* [Citations omitted.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation omitted.]

See also, Tobola v. Wholey, 75 Cal. App. 2d 351, 170 P.2d 952, 955 (Cal. App. 3 Dist. 1946) (although testimony that is inherently improbable must be disregarded, "such action is warranted only where the testimony involves a physical impossibility or its falsity is apparent without resort to inference or deduction."); *Butticci v. Schindel Furniture Co.*, 152 Cal. App. 2d 165, 313 p.2d 62, 65 (Cal. App. 1 Dist. 1957) (" . . . the mere fact that the admitted

circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal upon the ground that the verdict is contrary to the evidence."); *Gallipo v. City of Long Beach*, 164 Cal. App. 2d 70, 330 P.2d 91, 94 (Cal. App. 2 Dist. 1958) ("[w]hen any testimony believed by the trier of the facts relates events which are not completely contrary to human experience or would seem physically possible, the judgment cannot be reversed on appeal on the ground that such testimony is inherently unbelievable.")

In this case, none of the evidence presented by Latian, either through direct testimony of the Sarbazes or the cross-examination of Stefanon, related events that are physically impossible. To state the obvious, there is simply nothing physically impossible about a bank making an oral promise of a line of credit to a customer who would be assuming significant liabilities of another bank customer in financial distress.[9] The only other legally justifiable reason for an appellate court to disregard Latian's evidence in favor of evidence rejected by the fact-finder is if such evidence were obviously false, without resort to inference or deduction. Latian's evidence was clearly not obviously false. It was only because the Appellate Court relied on its own (unsupported and

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[9] This is especially true here where the uncontroverted evidence at trial, omitted and misstated by the Appellate Court, established that Banco had previously, *orally* agreed to provide a line of credit to Kudsy.

unsupportable) postulates of banking practices,[10] that it was able to state that the testimony of the bank representatives – contrasted with that of Latian and Sarbaz – was more "consistent" with other evidence presented. (Order, pp. 12-15, fn. 12.)

Certainly, the Appellate Court could not properly reject Latian's evidence on the basis of its own unsupported and uncross-examined pronouncement that "Banks simply do not do business that way." Yet this is exactly what it did. Even while doing so, however, the Appellate Court, incredibly enough, admitted both that Latian's evidence was sufficient to support the verdict, and that the jury believed Latian's evidence:

> Based upon respondents' testimony, which the jury apparently chose to believe, Banco's affirmative claims were rejected and respondents were awarded substantial damages.

(Order, p. 51.)

Quite obviously, the Appellate Court improperly weighed the evidence on appeal, disregarded evidence that it deemed inconsistent with its own view of "common banking practices," and picked and chose from the various versions of the facts testified to by Banco's representatives, to support the conclusion that Latian's "version was neither reasonable nor credible." The Appellate Court clearly stepped over the bounds of appellate jurisprudence in disregarding evidence on appeal that was

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[10] "These circumstances are consistent with common banking practices." (Order, p. 62.) Of course, there was no evidence of "common" banking practices in the record, whatever they may be.

accepted by the factfinder, and relying on other testimony – rejected by the factfinder – to reach the result it intended to reach all along.

Straining to find support for its conclusions, contrary to those of the jury, the Appellate Court also expressed its own opinion that the conduct of the respondents was inconsistent with their testimony that the $2 million line of credit was crucial to their purchase of the Kudsy assets. The Appellate Court found that it was curious and incredible that Latian would not have requested its counsel to put such a promise in writing. (Order, p. 63.) Of course, nothing in the record compels the conclusion (contrary to the jury's verdict) that it would be "incredible" for Latian to rely on an oral promise. In fact, the only evidence relevant to this issue was the testimony of Amanollah Sarbaz, who testified that in building his business in Iran, he dealt on a verbal and hand-shake basis in arranging for and using lines of bank credit.[11] (RT 516-519, 611-12.)

The Appellate Court concluded its comments regarding the sufficiency of Latian's evidence with rhetorical questions stark in their revelation of how the Appellate

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[11] Substantial evidence may consist of the testimony of a single witness, even if that one witness is a party. *See, e.g., In re Marriage of Kahan,* 174 Cal. App. 3d 63, 68, 219 Cal. Rptr. 700, 704 (Cal. App. 6 Dist. 1985); *Muffett v. Royster,* 147 Cal. App. 3d 289, 303, 195 Cal. Rptr. 73, 81 (Cal. App. 2 Dist. 1983); *Coldwell, Banker & Co. v. Pepper Tree Office Center Associates,* 106 Cal. App. 3d 272, 277, 165 Cal. Rptr. 51, 54 (Cal. App. 4 Dist. 1980); *Clark Equipment Co. v. Wheat,* 92 Cal. App. 3d 503, 518, 154 Cal. Rptr. 874, 881 (Cal. App. 1 Dist. 1979).

Court totally pre-judged this case based on its own *a priori* views of the banking business.

> Does the self-serving claim of the respondents make any sense? Would a bank which has so meticulously documented every aspect of a transaction commit itself orally and so casually to such an important obligation? *We think not. Banks simply do not do business that way.*

(Order, p. 66.) To which any half-intelligent reader of the morning paper must reply, "Oh, really?" Again, the record is absolutely devoid of any evidence to support such generalizations on how banks do business. More fundamentally, the Appellate Court's opinions as to how banks do business are no substitute for the evidence, tested by cross-examination, as the Appellate Court's pronouncements were not, and the jury's verdict based on the evidence, and do not justify disregarding the evidence in the record favorable to Latian.

VII. THE APPELLATE COURT FAILED TO GIVE THE TRIAL COURT'S OPINION ON POSTTRIAL MOTIONS ITS REQUIRED WEIGHT

In ruling on appellants' post-trial motions, the trial court specifically found that the evidence supported the jury's findings on liability and compensatory damages, and denied appellant's motion for a new trial. A trial court's denial of a motion for a new trial must be given great weight. *See, e.g., Seffert v. Los Angeles Transit Lines,* 56 Cal. 2d 498, 364 P.2d 337, 342, 15 Cal. Rptr. 161 (1961); *Torres v. City of Los Angeles,* 58 Cal. 2d 35, 372 P.2d 906, 917, 22 Cal. Rptr. 866 (1962); *Sturges v. Charles L. Harney, Inc.,* 165 Cal. App. 2d 306, 331 P.2d 1072, 1082 (Cal. App.

1958). Instead of following this established standard of review, the Appellate Court utterly ignored and disregarded the findings of the trial court on appellant's post-trial motions.

The only justification proffered by the Appellate Court for ignoring the trial court's findings on Banco's post-trial motions was that the trial court allegedly did not have the entire trial transcript at its disposal when ruling on the post-trial motions. This so-called finding, however, even if correct, provides no legal justification for disregarding determinations of the trial court on post-trial motions. The California Code of Civil Procedure recognizes that a trial transcript will not always be available within the 60-day period allowed for post-trial motions; § 660 therefore provides that if a full transcript is not available, "the reporter must upon request of the Court or either party, attend the hearing of the motion and shall read his notes, or such parts thereof as the Court, or either party, may require." Banco subpoenaed the court reporter, who was in attendance at the hearing on Banco's motion for a new trial. At no point during the hearing, however, did Banco request the reporter to read his notes. The ability to have the reporter present to read notes when a full transcript is not available has been recognized by California courts to be an adequate substitute for a full transcript. *See, e.g., In re Marriage of Liu*, 197 Cal. App. 3d 143, 242 Cal. Rptr. 649, 654 (Cal. App. 6 Dist. 1987). Therefore, the Appellate Court could not properly use the absence of a full transcript as a justification for ignoring the trial court's findings.

VIII. CONCLUSION

Latian had a judgment of $10.5 million against Banco for fraud and breach of contract. Now it must pay Banco several million dollars, because self-appointed experts on the Appellate Court, without citing legal or factual authority or being subject to cross-examination, believe "Banks simply do not do business that way." No litigant should be the victim of such summary, Star Chamber justice. The Appellate Court clearly disregarded and failed to apply proper standards of review on appeal, substituted itself as factfinder, and misapplied California law. To assure uniformity in the standards of review applied by California appellate courts, and to correct the critical misstatements and omissions of fact committed by the Appellate Court, Latian's Petition for Review must be granted.

Dated: November 6, 1991.

Respectfully submitted,

NICHOLAS R. ALLIS, ESQ.
JOSEPH M. ALIOTO, ESQ.
GRAY, PLANT, MOOTY, MOOTY
& BENNETT, PA.

By /s/ Daniel R. Shulman
Daniel R. Shulman
Richard G. Braman
Penny M. Tibke
Attorneys for respondents
and cross-appellants
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: (612) 343-2800

SUPREME COURT OF CALIFORNIA

Civil No. B 045477

BANCO DO BRASIL, S.A., Los Angeles Agency, a Banking association organized and existing under the laws of Brazil,

Plaintiff/Cross-Defendant/Appellant,

JOAO STEFANON, an individual,

Cross-Defendant/Appellant,

LATIAN, INC., a California corporation; AMANOLLAH SARBAZ, an individual; DOES 1-20, inclusive,

Defendant/Cross-Complainants/
Respondents and Cross-Appellants.

Appeal from the Court of Appeals
of the State of California
Appellate Justice Croskey
Concurrences by Justices Klein, P.J. and Danielson

RESPONDENTS' AND CROSS-APPELLANTS' REPLY IN SUPPORT OF PETITION FOR REVIEW

GRAY, PLANT,
MOOTY, MOOTY
& BENNETT, P.A.
DANIEL R. SHULMAN
RICHARD G. BRAMAN
PENNY M. TIBKE
3400 City Center
33 South Sixth Street
Minneapolis, MN 55402
(612) 343-2800

THE LAW FIRM OF
JOSEPH M. ALIOTO
JOSEPH M. ALIOTO
600 Montgomery Street
Forty-third Floor
San Francisco, CA 94111
(415) 434-8900

NICHOLAS ALLIS, ESQ.
11601 Wilshire Boulevard
Suite 1830
Los Angeles, CA 90025
(213) 477-1200

Attorneys for Respondents and Cross-Appellants

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I. INTRODUCTION

Pursuant to Rule 28(d) of the California Rules of Court, Respondents and Cross-appellants ("Latian") submit this memorandum in reply to the answer filed by Appellants Banco do Brasil, S.A. and Joao Stefanon (collectively referred to herein as "Banco"). Banco's answer raises several issues to which this memorandum will respond. First, Banco contends that Latian has failed to show that any prerequisite for review under Rule 29 of the California Rules of Court is present in this case. Second, Banco claims that Latian has improperly attempted to sensationalize this case and "create guilt by association by fallaciously equating Banco's denial of a line of credit with the BCCI and S & L fiascos, the third world debt crisis, and every other notorious 'scandal du jour' which they hope might strike an angry chord in their audience." (Banco's Answer, p. 5.) Third, Banco

claims that the Court of Appeals was the first court to ever base its decision upon a written record of the trial, and argues that because of that, the trial court's post-judgment rulings should not be given their ordinary weight. Finally, Banco claims that *United States v. Hub City Volkswagen, Inc.*, 625 F.2d 213 (9th Cir. 1980), fails to support Latian's argument that the oral agreement upon which Latian's claims are based is not inconsistent with the 1983 Guaranty Agreement. Each of these issues is discussed below.

Banco claims that this case is "a simple 'lender liability' action, in which a commercial borrower sought to avoid payment on a loan agreement by claiming the Bank breached an 'oral side agreement' to grant a $2 million line of credit." (Answer, p. 2.) The Court of Appeals also mischaracterized the case as one involving lender liability. (Court of Appeal Order ("Order"), p. 2.) This is *not* a lender liability case – it is an action based on common law breach of contract and fraud. Lender liability actions are based upon a heightened duty of a bank when dealing with its customers. By mischaracterizing this case as one of lender liability, Banco (and the Court of Appeals) apparently hope that this Court will view it as yet another "unremarkable" lender liability case.[1]

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[1] Banco also attempts to mislead the Court into believing that Latian's counterclaim was merely a defensive measure. The evidence of record shows, however, that Banco filed suit only to position itself as the plaintiff in this action, knowing not only that Latian had grounds to sue Banco (RT 1470-71, 1503-06), but that Latian *intended* to bring suit against Banco (RT 1569-70).

This case – before it reached the hands of the Court of Appeals – was a simple case of fraud and breach of contract, where factual disputes were decided, as provided for by both the federal and state constitutions, by a jury. The Court of Appeals' decision raises important constitutional issues. By making its premise – found nowhere in the trial record – that banks simply do not make "cavalier" oral agreements for lines of credit, the Court of Appeals denied Latian due process of law, the fundamental right of cross-examination of witnesses, and the right to trial by jury.

II. ANALYSIS

A. THIS CASE INVOLVES IMPORTANT QUESTIONS OF LAW UNDER WHICH UNIFORMITY OF DECISION IS ESSENTIAL.

In reversing both the jury's verdict and the rulings of the trial court on post-trial motions, the Appellate Court usurped the roles of expert witness and the jury. By reversing the trial court's determination that the 1983 Guaranty Agreement was not integrated, the Court of Appeals applied an incorrect *de novo* standard, failing to give proper deference to the trial court's factual determination.[2] Furthermore, by rejecting the myriad of evidence presented at trial by Latian and *making up its own evidence,* the Court of Appeals flagrantly usurped both the witnesses' and the jury's functions.

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[2] Banco claims that the trial court based its decision that the 1983 Guaranty Agreement was not integrated on only one piece of evidence. Contrary to this assertion, however, Judge

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As Justice Carter commented in *Doran v. City and County of San Francisco*, 283 P.2d 1, 18 (1955) (Carter, J. dissenting):

> Unless we wish to repeal the portions of the Constitution of the United States and the Constitution of the State of California which guarantee the right to trial by jury, the result of this case must not be allowed to stand.

Further comments by Justice Carter are particularly applicable here:

> I would commend to the majority of this court a reading of the history of the development of the jury system, e.g., James B. Thayer, *The Jury and Its Development*, 5 Harvard Law Review 249 (1892). A cursory examination of that history will show that from its first establishment as a part of our system of law, the jury has had the function of determining facts. . . . Do [my colleagues on this bench] seek a return to the feudal system or some other pre-twelfth century form of judicial administration?
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> I believe in Constitutional government. I believe in obeying Constitutional mandates. I believe the people of this state have the right to expect

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Mills had before him more evidence than that, including the past practices of Banco to *not* put all loan agreements in writing, and the Security Agreement (Part of the 1983 Guaranty Agreement), which specifically recites that Latian is granting a security interest to Banco "as an inducement to Secured Party [Banco] to extend credit to Debtor [Latian] from time to time. . . . " (Plaintiff Exhibit 1.)

> of the Justices of this Court that they will obey their oath of office and support the Constitution of the United States and the Constitution of California, and I believe that when the Justices of this Court decide that a party is not entitled to have a jury decide issues of fact in a case in which such party is entitled to a jury trial as a matter of right, they are not supporting the Constitution and are violating their oath of office.
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> If a majority of this Court can deny a litigant the right to a jury trial in one case, it can do it in a hundred cases, or it can do it in every case.

Id., at 18-19.

In reaching its decision in this case, the Court of Appeals denied Latian's rights to due process and a jury trial. Latian submits that this Supreme Court will find no similar case left standing by the highest court of any state, and that the decision in this case by the California Court of Appeals is an aberration. "Uniformity of decision" is crucial where a civil litigant's right to a jury trial is at issue. This case meets the standards for review set forth in Rule 29(a) of the California Rules of Court.

Contrary to Banco's assertions, the Court of Appeals did not apply the correct legal standard when it rejected all of Latian's evidence in support of the verdict. The Court found that the evidence was not "solid, credible or reasonable," but did not follow the strict standard set forth by the Supreme Court of California in coming to that conclusion. (Order, p. 66.) That standard is set forth in *People v. Thornton*, 11 Ca1.3d 738, 754, 114 Cal. Rptr. 467, 523 P.2d 267 (1974):

> Although an Appellate Court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [CITATION] To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [CITATIONS] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [CITATION]

Applying these principles, the decision by the Court of Appeals cannot stand. In determining that Latian's evidence was insubstantial and unreasonable, the Court resorted to unsupported premises, such as that Latian's claim that Banco orally promised a line of credit "requires one to believe that a bank officer, without receiving any information as to the borrower's financial condition or history, would (or could) commit his bank to an open-ended multi-million dollar obligation without discussion . . . " (Order, p. 62); that Latian's "contemporaneous conduct" was "inconsistent" with their claim that the $2 million line of credit was essential to their purchase of the business because no reference to a "$2 million line of credit" was made in any of the offers for the company (Order, p. 63); and that Latian's failure to provide financial information to Banco was "inexplicable" if it really was the case that the line of credit was "critical" to their

decision to go forward with the purchase of the companies. (Order. p. 64.) None of these examples provided by the Court, however, shows that Latian's evidence involved a "physical impossibility," or a falsity without resort to inferences or deductions. The Court's conclusion that Latian's evidence was unreasonable was based upon the Court's preconceived notions about what would be reasonable conduct in this situation. Such unsupported musings by an Appellate Court should not be allowed, and cannot be allowed under a system of justice where facts are determined by juries, not judges.

B. LATIAN HAS NOT SENSATIONALIZED THIS CASE.

Banco accuses Latian of making "sensationalist, *ad hominem* attacks upon the Appellate Court" in an attempt to "shock this Court." The only example provided by Banco of Latian's alleged *ad hominem* attacks on the Appellate Court is Latian's statement that the decision by the Appellate Court "was patently result-oriented, . . . " (Banco's Answer p. 5, n.4.) Latian stands by this depiction of the Court of Appeals' decision, and submits that upon even a cursory review of the opinion, one can come to no other conclusion. When an appellate court resorts to unsupported statements such as "banks simply do not do business that way" and "that a bank . . . would make a cavalier oral commitment . . . to provide further open-ended credit is an incredible proposition" to support its reversal of a jury verdict, this Court must stand up and take notice. (Order, pp. 50, 66.)

Banco also accuses Latian of trying to create "guilt by association" in bringing up the bank scandals of the past few years. Latian's purpose in pointing out these incidents, however, was not to create guilt by association, but rather to point out that the Court made unsupported statements (without being subject to cross-examination) about what it viewed to be normal banking practices.[3] It is *not* a valid starting point for the Court of Appeals to assume that banks do not make oral promises to their customers.

C. THE TRIAL COURT'S RULINGS DESERVE DEFERENCE.

Banco claims that the Court of Appeals was the only court to have "the benefit of a written record" when making its rulings.[4] (Banco's Answer, p. 1, n.1.) This

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[3] Banco applauds the Court's unsupported statements as "simply a common sense observation based on practices in the real world. . . . " This is precisely what Latian was attempting to rebut by pointing out BCCI and the S&L scandals. Had any expert witness expressed such a view at trial, that expert would have been subjected to devastating cross-examination on the recent bank scandals.

The real world in general is not as the Court of Appeals depicted it, which makes the Court's blanket absolution of banks in general particularly offensive. This case cannot be dealt with by relying on unsupported, generalized statements. It must be decided on its *own* facts, which it properly was by the jury, and affirmed in strong language by the trial court.

[4] Contrary to Banco's assertion, much of the trial had been transcribed by the time of the post-trial motions, and was in front of Judge Lavine when he considered and made his rulings on the post-trial motions. (*See* CT 5156, 5161.)

raises an important issue of what amount of deference is owed lower court decisions when they are based on anything but a complete trial transcript.

Contrary to the Court of Appeals intimations, the fact that a full transcript was absent at the time Judge Lavine made his post-trial rulings provides no legal justification for ignoring the trial court's findings. The California Code of Civil Procedure § 660 provides the mechanism for protecting a party's rights in such a situation. Banco followed that procedure and subpoenaed the court reporter to be in attendance at the hearing on Banco's motion for a new trial. At no point during the hearing did Banco request the reporter to read his notes. Banco cannot now claim that Latian overstated, misstated, or mischaracterized the facts at the time of the post-trial motions.

After review of (1) the trial transcripts lodged with the Court by Banco (RT 5156, 5161), (2) the extensive briefs filed by both parties, and (3) oral arguments extending over at least three different days, Judge Lavine made the following factual findings:

> The Court finds this is a situation in which Stefanon had a strategy to defraud the Sarbaz family as early as 1982 and fully informed his superior of the strategy; the course of conduct of the bank was a deliberate attempt to take advantage of the Sarbaz family; the bank made its representations to Latian repeatedly on every occasion Latian signed a document. After Latian delivered his check for $310,000 to be held in trust until the line of credit was approved, the bank broke its promise by appropriating the $310,000; the bank knew of the culpability

> throughout the events, as evidenced by Stefanon's contract, written reports, and the top officials, aside from Stefanon, tried to cover up.

Minute Order, September 29, 1989, CT 5360-63.

D. THE COURT OF APPEALS ERRED IN NOT FOLLOWING THE HOLDING OF HUB CITY.

Banco contends that *Hub City,* which dealt precisely with the issue created by the Appellate Court, is merely a "*federal case* which is factually distinguishable from the above California authority and does not conflict with it." (Banco's Answer, p. 23.) Of course, Banco does not explain how *Hub City,* 625 F.2d 213 (9th Cir. 1980) can be factually distinguished – for the very good reason that it is factually *indistinguishable.* The Ninth Circuit noted in *Hub City* that under both California and federal law, no contradiction exists between an obligation being unconditional, yet there being a condition precedent to the enforcement of the obligation. 625 F.2d at 214, n.2. In *Hub City,* the relevant document was a guarantee that *expressly* provided that the guarantor "unconditionally" guaranteed the loan. The Ninth Circuit held that the parol evidence rule did not apply to exclude testimony of an orally agreed-to condition precedent that the guarantee would not become effective until signed by all of Hub City's shareholders. The Ninth Circuit explained:

> Neither of these two clauses [that provided that the guarantors "unconditionally" guaranteed the loan] had any force until the guarantee became effective. If the guarantors are able to establish at trial that they did in fact have the

> alleged agreement with bank officials, then neither of these two clauses ever became effective, and neither is inconsistent with the oral condition precedent. [Citations omitted.] If each guarantee had contained a clause stating that it would be binding regardless of whether the bank obtained similar guarantees from other individuals, the evidence of the oral agreement would have been properly excluded under the parol evidence rule. The guarantees in this case contained no such provision.

625 F.2d at 215.

Analogously, in this case, if the 1983 Guaranty Agreement had contained a clause stating that it would be binding regardless of whether Banco do Brasil provided a $2 million line of credit to Latian, then evidence of the oral agreement might have been properly excluded under the parol evidence rule. The Guaranty Agreement, however, contained no such provision. Accordingly, the fact that the 1983 Guaranty Agreement provided for an unconditional obligation on the part of Latian provides no inconsistency to Latian's claim that the agreement did not become effective until the condition precedent was satisfied, that being the provision of a $2 million line of credit.

The very argument rejected by the Ninth Circuit in *Hub City* was the Court of Appeals' *only* argument in support of its finding that the parol evidence rule should have excluded all evidence of the oral promise made by Banco. In so holding, the Court of Appeals misconstrued California law. For this reason, review by this Court is warranted to preserve uniformly of decision on this important issue of law.

III. CONCLUSION

The Appellate Court did not apply proper standards of review on appeal in this case. It not only disregarded the trial court's factual findings, but it flagrantly substituted itself for both expert witness without cross-examination and the jury when it determined that the evidence presented by Latian was unreasonable. The issues created by the Court of Appeals' decision in this case cry out for review by this Court. Latian respectfully submits that its petition for review must be granted.

Dated: December 6, 1991

Respectfully submitted,

NICHOLAS R. ALLIS, ESQ.
JOSEPH M. ALIOTO, ESQ.
GRAY, PLANT, MOOTY, MOOTY
& BENNETT, PA.

By /s/ Daniel R. Shulman
Daniel R. Shulman
Richard G. Braman
Penny M. Tibke
Attorneys for Respondents
and Cross-appellants
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: (612) 343-2800